Supreme Court, U.S.
FILED
APR 7 1993
OFFICE OF THE CLERK

No. 92-1560

In The

# Supreme Court of the United States

October Term, 1992

SELMAN (JOE) THOMAS, JR., et al.,

*Petitioners,*

vs.

METZ BAKING COMPANY, BAKERY, CONFECTIONARY & TOBACCO WORKERS UNION LOCAL #433 and CURTIS BURTON, et al.,

*Respondents.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## INTERVENORS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

M. H. WEINBERG
WEINBERG & WEINBERG, P.C.
The Mark
9290 West Dodge Road
Suite 205
Omaha, NE 68114-3322
Telephone: 402-397-0999

*Counsel of Record for Intervenors*

RECEIVED
APR 8 1993
OFFICE OF THE CLERK
SUPREME COURT, U.S.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS AND ADMINISTRATIVE AGENCIES..... 1

STATEMENT OF THE CASE..... 1

ARGUMENT ..... 3

I. METZ, THE UNION, AND THE INTERVENORS DID NOT BREACH THE SENIORITY AND RECALL PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENTS WITH METZ AND INTERSTATE BRANDS, BECAUSE THE PETITIONERS REQUESTED THROUGH ARBITRATION, AND OBTAINED THROUGH COURT ACTION, SEVERANCE PAY FOR TIME SERVED UNDER *BOTH* THE INTERSTATE BRANDS AND METZ CONTRACTS, THUS CONTRACTUALLY BARRING ANY CLAIMS FOR LOSS OF SENIORITY OR JOBS AND ANY DAMAGES RELATED THERETO..... 3

II. THE ARGUMENT OF PLAINTIFFS AS TO THE EFFECT OF THE RECEIPT DOES NOT BIND THE INTERVENORS..... 9

III. THE PETITIONERS CANNOT NOW CLAIM THAT AN ACTUAL VOTE IS NEEDED BECAUSE NO EVIDENCE ON THE RECORD SHOWS (1) THAT THEY ASKED FOR AN ACTUAL VOTE; (2) WERE IMPROPERLY DENIED AN ACTUAL VOTE; OR (3) THAT THEY EVER ARGUED FOR AN ACTUAL VOTE AS A REMEDY IN THIS PROCEEDING..... 10

CONCLUSION ..... 12

APPENDIX .....App. 1

# TABLE OF AUTHORITIES

Page

CASES

*Gall v. South Dakota National Bank of South Dakota of Sioux Falls, South Dakota*, 783 F.2d 125 (C.A. 8, 1986) ..... 9

*Hormel v. Helvering*, 312 U.S. 552, 61 S.Ct. 719, 85 L.Ed. 1047 (1941) ..... 11

*Hormel v. Helvering*, 111 F.2d 1 (C.A. 8, 1940) ..... 11

*International Union of Electrical, Radio and Machine Workers, AFL-CIO v. NLRB v. Tiidee Products, Inc.*, 426 F.2d 1243, 73 LRRM (BNA) 2870, 75 LRRM (BNA) 2350, 138 U.S. App. D.C. 249, (U.S. Court of Appeals, D.C. 1969); rehearing denied in *International Union of Electrical Radio and Machine Workers, AFL-CIO v. NLRB*, 170 WL 2763, 63 Lab. Cal. ¶11,174 (D.C. Cir. 9/21/70) cert. denied by *Tiidee Products, Inc. v. International Union of Electrical, Radio and Machine Workers, AFL-CIO*, 400 U.S. 950, 91 S.Ct. 239, 27 L.Ed.2d 256, 75 LRRM (BNA) 2752, 64 Lab. Cas. ¶11,310 (12/7/70); case was appealed after remand in *International Union of Electrical, Radio and Machine Workers, AFL-CIO v. NLRB*, 502 F.2d 349, 86 LRRM (BNA) 2093, 87 LRRM (BNA) 2255, 163 U.S. App. D.C. 347, 73 Lab. Cas. ¶14,482, 74 Lab. Cas. ¶10,280 (4/25/74); cert. denied in *Tiidee Products, Inc. v. NLRB*, 417 U.S. 921, 94 S. Ct. 2629, 41 L.Ed. 2d 226, 86 LRRM (BNA) 2427, 74 Lab. Cas. ¶10,338 (5/28/74); cert. denied in *International Union of Electrical, Radio and Machine Workers, AFL-CIO v. NLRB*, 417 U.S. 921, 94 S. Ct. 2629, 41 L.Ed. 2d 226 (5/28/74); and cert. denied in *Tiidee Products, Inc. v. NLRB*, 421 U.S. 991, 95 S. Ct. 1997. 44 L.Ed.2d 481, 89 LRRM (BNA) 2358, 77 Lab. Cas. ¶10,875 (5/27/75) ..... 4, 6

TABLE OF AUTHORITIES – Continued

Page

*International Union of Electrical, Radio and Machine Workers, AFL-CIO v. NLRB v. Tiidee Products, Inc.*, 440 F.2d 298, 76 LRRM (BNA) 2109, 142 U.S. App. D.C. 270, 64 Lab. Cas. ¶11,370 (U.S. Court of Appeals D.C., 1970); case was appealed after remand in *International Union of Electrical, Radio and Machine Workers, AFL-CIO v. NLRB*, 502 F.2d 349, 86 LRRM (BNA) 2093, 87 LRRM (BNA) 2255, 163 U.S. App. D.C. 347, 73 Lab. Cas. ¶14,482, 163 U.S. App. D.C. ¶14,482, 74 Lab. Cas. ¶10,280 (4/25/74) cert. denied by *Tiidee Products, Inc. v. NLRB*, 417 U.S. 921, 94 S. Ct. 2629, 41 L.Ed. 2d 226, 86 LRRM (BNA) 2427, 74 Lab. Cas. ¶10,057, 75 Lab. Cas. ¶10,338 (5/28/74); cert. denied by *International Union of Electrical, Radio and Machine Workers, AFL-CIO v. NLRB*, 417 U.S. 921, 94 S.Ct. 2629, 41 L.Ed. 2d 226 (5/28/74); and cert. denied by *Tiidee Products, Inc. v. NLRB*, 421 U.S. 991, 95 S.Ct. 1997, 44 L.Ed. 2d 481, 89 LRRM (BNA) 2358, 77 Lab. Cas. ¶10,875 (5/27/75) ..... 5

*Jones v. State of Arkansas*, 929 F.2d 375 (C.A. 8, 1991) ..... 11

*Kneeland v. Luce et al.*, 141 U.S. 437, 12 S. Ct. 39 (1891) ..... 9

*LaRouche v. Federal Bureau of Investigation*, 677 F.2d 256 (C.A. 2, 1982) ..... 9

*Leicht v. Commission of Internal Revenue*, 137 F.2d 433 (C.A. 8, 1943) ..... 8

*Madison Square Garden Boxing, Inc. v. Shavers*, 562 F.2d 141 (C.A. 2, 1948) ..... 9

TABLE OF AUTHORITIES – Continued

Page

*Merk v. Jewel Food Stores Division of Jewel Companies, Incorporated*, 945 F.2d 889, 60 U.S.L.W. 2243, 138 LRRM (BNA) 2433, 120 Lab. Cas. ¶10,972, *cert. den.*, 112 S. Ct. 1951, 118 L.Ed. 2d 555, 60 U.S.L.W. 3701, 60 U.S.L.W. 3775, 60 U.S.L.W. 3780, 140 LRRM (BNA) 2320, 121 Lab. Cas. ¶10,165 (1992) ..... 12

*Raylite Electric Corp. v. Noma Electric Corp.*, 170 F.2d 914 (C.A. 2, 1948) ..... 9

*Secretary of State v. International Brotherhood of Teamsters*, 805 F.2d 682 (C.A. 7, 1988) ..... 9

*Selman (Joe) Thomas, Jr. et al. v. Interstate Brands Corporation*, United States District Court for the District of Nebraska Civil No. 83-0-560 (U.S.D.C. Neb., 1985) ..... 2

*St. Louis Typographical Union No. 8, AFL-CIO, Appellants v. Heard Company d/b/a Globe-Democrat Publishing Company, Appellee*, 402 F.2d 553 (C.A. 8, 1968) ..... 8

*Thomas et al. v. Bakery, Confectionery, and Tobacco Workers International Union, Local #433 and Metz Baking Company v. Curtis Barton, et al.*, 982 F.2d 1215, 1220 (C.A. 8, 1992) ..... 7

*Trapp v. Metropolitan Life Insurance Co.*, 70 F.2d 976 (C.A. 8, 1934) ..... 11

*United States v. Latrobe Construction Company*, 246 F.2d 357 (C.A. 8, 1957) ..... 11

*Woodell v. International Brotherhood of Electrical Workers, Local 71*, 112 S. Ct. 494, 116 L.Ed. 2d 419, 60 U.S.L.W. 4024, 138 LRRM (BNA) 2881, 120 Lab. Cas. ¶11,010 (1992) ..... 12

TABLE OF AUTHORITIES – Continued -

Page

MISCELLANEOUS

Supreme Court Rule 15 ..... 3

*Interstate Brands Corporation and Bakery, Confectionery and Tobacco Workers Union, Local No. 433,* Arbitration Award ..... 1, 8

## REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS ADMINISTRATIVE AGENCIES

The list set out below is in addition to and supplemental to the lists of all other parties and is given with the intention of providing added sources:

1. Arbitrator's Award by James A. Doyle dated December 15, 1983 titled *Interstate Brands Corporation and Bakery Confectionery and Tobacco Workers Union, Local No. 433* covering severance pay. (Referred to hereinafter as "Doyle II."
2. Memorandum Opinion of the District Court (unreported) dated September 9, 1985 delivered by Senior Judge Richard Robinson titled *Selman (Joe) Thomas, Jr. et al., Plaintiffs v. Interstate Brands Corporation, et al., Defendants,* Civil No. 83-0-560
3. Pretrial Order dated April 10, 1985 in the above case.

## STATEMENT OF THE CASE

The Intervenors' Statement of the Case will supplement the other parties' Statement of the Case and will provide facts not otherwise disclosed.

Prior to the first trial in this case, James A. Doyle rendered an arbitration award (Doyle II) granting the Plaintiffs severance pay related to service with Interstate Brands Corporation, their employer prior to Metz. (App. A) The Plaintiffs filed an action in the United States District Court for the District of Nebraska, Civil No.

83-0-560 seeking a resolution of five issues spelled out in the Pretrial Order related to the Doyle II arbitration. (App. B) Senior Judge Richard Robinson rendered a Memorandum Opinion filed on September 15, 1985 concluding that Metz was entitled to a receipt and determined that the receipt required by Metz "does not release all of plaintiffs' rights against Metz." (App. 37) The determination of the effect of taking severance pay from Interstate Brands Corporation for service with Interstate Brands Corporation was left to this case. Doyle II was not attacked by any party. The issue of the effect of the receipt of severance pay was left up to Judge Strom and his interpretation of the collective bargaining agreement.

The Petitioners received all their severance pay from Interstate Brands service *and* Metz service prior to filing this case. The case was tried to Judge Strom and the above evidence was presented along with the receipts of the Plaintiffs for severance pay for *both* Interstate Brands *and* Metz work.

## ARGUMENT

### I. METZ, THE UNION, AND THE INTERVENORS DID NOT BREACH THE SENIORITY AND RECALL PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENTS WITH METZ AND INTERSTATE BRANDS, BECAUSE THE PETITIONERS REQUESTED THROUGH ARBITRATION, AND OBTAINED THROUGH COURT ACTION, SEVERANCE PAY FOR TIME SERVED UNDER *BOTH* THE INTERSTATE BRANDS AND METZ CONTRACTS, THUS CONTRACTUALLY BARRING ANY CLAIMS FOR LOSS OF SENIORITY OR JOBS AND ANY DAMAGES RELATED THERETO.

A Brief in Opposition to a Petition for Writ of Certiorari must correct perceived misstatements of fact and/or law or waive them. Supreme Court Rule 15.

The Petitioner implies in Argument I of his brief, that if the collective bargaining agreements were enforced, that there would be damages for Plaintiffs' loss of seniority, recall rights, pay and fringe benefits. That is neither legally nor factually correct for the reasons specified herein.

James A. Doyle actually held two arbitrations. The second arbitration decision dated December 15, 1983 gave severance pay to the Plaintiffs for time worked for Interstate Brands Corporation. (App. 23) The Plaintiffs were ably represented by Dayton O. Rasmussen, Esquire, their attorney. Following the decision, Metz wanted a release if they paid severance pay to the greivants. Dayton O. Rasmussen filed an action in the United States District Court for the District of Nebraska. The pretrial Order

(App. B) listed five issues. On September 15, 1985, Senior Judge Richard Robinson rendered a Memorandum Order finding that Doyle II would be enforced but that only a receipt would be required and that the receipt "does not release all of the Plaintiffs' rights *against Metz*." The Court did not explain what rights were not released or whether rights were released against the Union or the Intervenors. Evidently, this would be left up to the Trial Judge, Chief Judge Lyle Strom, in this case.

Upon trial of this case, evidence showed that the Plaintiffs accepted severance pay for time worked for *both* Metz and Interstate Brands. The collective bargaining agreement (App. 88) provides that acceptance of severance pay forfeits seniority and recall rights. (Article XXXIV, Section 2(f)). If the Plaintiffs do not have Metz and/or Interstate Brands Corporation seniority and recall rights, they cannot outbid the Intervenors for jobs and would not be entitled to damages for loss of jobs they were not entitled to in the first place.

The district Court determined, however, that a vote should have taken place and that damages were due until the vote would have taken place settling the seniority issue. The Intervenors concede that this remedy is an alternative remedy well established by the National Labor Relations Board. See *International Union of Electrical, Radio and Machine Workers, AFL-CIO v. National Labor Relations Board v. Tiidee Products, Inc.*, 426 F.2d 1243, 73 LRRM (BNA) 2870, 75 LRRM (BNA) 2350, 138 U.S. App. D.C. 249, U.S. Court of Appeals, District of Columbia (1969). Rehearing was denied by *International Union of Electrical, Radio and Machine Workers, AFL-CIO v. NLRB*, 1970 WL 2763, 63 Lab. Cas. ¶11,174 (D.C. Cir. 9/21/70).

Certiorari was denied by *Tiidee Products, Inc. v. International Union of Electrical, Radio and Machine Workers, AFL-CIO*, 400 U.S. 950, 91 S.Ct. 239, 27 L.Ed. 2d 256, 75 LRRM (BNA) 2752, 64 Lab. Cas. ¶11,310 (12/7/70). The case was appealed after remand. *International Union of Electrical, Radio, and Machine Workers, AFL-CIO v. NLRB*, 502 F.2d 349, 86 LRRM (BNA) 2093, 87 LRRM (BNA) 2255, 163 U.S. App. D.C. 347, 73 Lab Cas. ¶14,482, 74 Lab. Cas. ¶10,280 (4/25/74). Certiorari was denied by *Tiidee Products, Inc. v. NLRB*, 417 U.S. 921, 94 S.Ct. 2629, 41 L.Ed. 2d 226, 86 LRRM (BNA) 2427, 74 Lab. Cas. ¶10,057, 75 Lab. Cas. ¶10,338 (5/28/74). Certiorari was denied by *International Union of Electrical, Radio and Machine Workers, AFL-CIO v. NLRB*, 417 U.S. 921, 94 S.Ct. 2629, 41 L.Ed. 2d 226 (5/28/74). Certiorari was denied by *Tiidee Products, Inc. v. NLRB*, 421 U.S. 991, 95 S.Ct. 1997, 44 L.Ed. 2d 481, 89 LRRM (BNA) 2358, 77 Lab. Cas. ¶10,875 (5/27/75). A further case related thereto is cited as *International Union of Electrical, Radio and Machine Workers, AFL-CIO v. NLRB*, 440 F.2d 298, 76 LRRM (BNA) 2109, 142 U.S. App. D.C. 270, 64 Lab. Cas. ¶11,370 (12/23/70). There was an appeal after remand, cited as *International Union of Electrical, Radio, and Machine Workers, AFL-CIO v. NLRB*, 502 F.2d 349, 86 LRRM (BNA) 2093, 87 LRRM (BNA) 2255, 163 U.S. App. D.C. 347, 73 Lab. Cas. ¶14,482, 163 U.S. App. D.C. ¶14,482, 74 Lab Cas. ¶10,280 (4/25/74). Certiorari was denied in *Tiidee Products, Inc. v. NLRB*, 417 U.S. 921, 94 S. Ct. 2629, 41 L.Ed. 2d 226, 86 LRRM (BNA) 2427, 74 Lab. Cas. ¶10,057, 75 Lab. Cas. ¶10,338 (5/28/74). Certiorari was denied by *International Union of Electrical, Radio and Machine Workers, AFL-CIO v. NLRB*, 417 U.S. 921, 94 S.Ct. 2629, 41 L.Ed. 2d 226 (5/28/74) and by *Tiidee*

*Products, Inc. v. NLRB*, 421 U.S. 991, 95 S.Ct. 1997, 44 L.Ed. 2d 481, 89 LRRM (BNA) 2358, 77 Lab. Cas. ¶10,875 (5/27/75). In the first case cited in the series, the Board determined damages based on an assessment of the contract terms that would have been in effect if the law had been complied with even though the law-violating employer had not yet entered into the contract. The United States Court of Appeals for the District of Columbia stated:

> *"We reiterate that damages can be awarded on an assessment of the contract terms that would have been in effect if the law had been complied with even though the law-violating employer had not yet entered into the contract." International Union of Electrical, Radio and Machine Workers, AFL-CIO v. NLRB v. Tiidee Products*, 426 F.2d 1243, *supra*, at 1253.

The D. C. Circuit used the hypothetical contract to determine damages and not as a collective bargaining agreement thus getting around the National Labor Relations Act bar on agencies forcing contracts between labor and management.

In this case, the Eighth Circuit Court of Appeals affirmed that finding of Judge Strom in finding that the appropriate remedy would be to look to a vote based upon affidavits of bargaining unit members to access damages. The Eighth Circuit was satisfied with the evidence demonstrating the outcome of the vote and thus the hypothetical agreement produced with the Union and Metz. That factual finding is not clearly erroneous and has not been appealed. So we are not faced with continual appeals in *Tiidee Products* involving proof of what the

contract would be. We can thus rely on the trial court's, circuit's and Supreme Court's determination of the law thereon in *Tiidee Products* that damages can be awarded based on the assessment of contract terms that would have been in effect if the law had been complied with. And can also rely on the determination of Judge Strom, the trial judge, as to what seniority provisions would be in a contract if a vote were taken. Thus, the Plaintiffs have neither seniority nor recall rights; the Plaintiffs have no loss; and the Plaintiffs have no damages.

In the Petition for Certiorari, however, the Plaintiffs state that the current collective bargaining agreement should have been enforced without using a hypothetical vote to determine what the new contract would be and if that were the case, more damages should be assessed.

The Intervenors argue *first* that the Eighth Circuit Court of Appeals took the right approach in finding:

> *"In light of our decision, it is unnecessary to address the arguments of the Intervenors. Our affirmance of the merits of the main appeal necessarily means that plaintiffs have no seniority rights superior to those of the intervening group of Metz employees.*
>
> *Affirmed."*

See *Thomas et al. v. Bakery, Confectionery and Tobacco Workers International Union, Local #433 and Metz Baking Company v. Curtis Barton et al.*, 982 F.2d 1215, 1220, (C.A. 8, 1992). Thus if the Plaintiffs do not have seniority, they do not have the jobs or damages after the vote.

The Intervenors argue *second* that even if the trial court and the circuit court were wrong, that there would be no damages due since the Plaintiffs lost no rights to jobs. The Plaintiffs gave those rights up on accepting severance pay for both Interstate Brands *and* Metz

employment. Basically without legal harm, there can be no damage.

Doyle II is *res judicata* as an arbitration award. See *St. Louis Typographical Union No. 8, AFL-CIO, Appellants v. Heard Company d/b/a Globe-Democrat Publishing Company, Appellee*, 402 F.2d 553 (C.A. 8, 1968) and *Leicht v. Commission of Internal Revenue*, 137 F.2d 433 (C.A. 8, 1943). Judge Robinson left open the issues of the effect of the receipt on *Metz*. Judge Robinson did not determine the effect of the receipt on the Union (or for that matter the Intervenors). But, since that issue could have been litigated and was not, one can refer to the doctrine of *res judicata* and thus assume that the Union and the Intervenors could rely on the receipt and the contract to bar seniority and recall rights.

The Circuit Court determined that the Intervenors had seniority greater than the Plaintiffs. If that award was not appealed, then that award is *res judicata* for the Intervenors relative to the Plaintiffs. The Questions Presented for Review by the Petitioner do not disclose any issue related to the Intervenors' superior seniority rights. If the Intervenors have superior seniority, then the Plaintiffs have no right to the jobs and suffer no loss.

In summary, based upon the application of the doctrine of *res judicata* even if the theory of the Circuit and the trial court were incorrect, the Plaintiffs have no right to the jobs and, thus, no loss. Whether one looks to the period after the hypothetical vote and finds no loss of seniority after the vote and thus no damage after the vote, or, determines that severance pay forfeits seniority from the date of hire, then under either scenario, there is

no right to jobs and no loss from and after the date of a vote. In either event, the Circuit and the trial court were correct.

## II. THE ARGUMENT OF PLAINTIFFS AS TO THE EFFECT OF THE RECEIPT DOES NOT BIND THE INTERVENORS.

The joint stipulation of the Plaintiffs, Metz, and the Union, in Civil No. 83-0-560 does not bind the Intervenors and was superseded by the Intervenors' amended pleadings and the Pretrial Order for the remedies trial in this case.

The Intervenors are not parties to the Stipulation in Civil No. 83-0-560 and are not bound to it. *Kneeland v. Luce, et al.*, 141 U.S. 437, 12 S. Ct. 39 (1891); *Raylite Electric Corp. v. Noma Electric Corp.*, 190 F.2d 914 (C.A. 2, 1948); *Madison Square Garden Boxing, Inc. v. Shavers*, 562 F.2d 141 (C.A. 2, 1977); and *LaRouche v. Federal Bureau of Investigation*, 677 F.2d 256 (C.A. 2, 1982). See also *Secretary of Labor v. International Brotherhood of Teamsters*, 805 F.2d 682 (C.A. 7, 1988). The Eighth Circuit has ruled that a stipulation is not binding on a non-participating third party defendant. See *Gall v. South Dakota National Bank of South Dakota of Sioux Falls, South Dakota*, 783 F.2d 125 (C.A. 8, 1986).

As far as the Intervenors go, the receipt is a release of rights under Article XXXIV, Section 2(f) of the contract. As such, the Plaintiffs cannot outbid the Intervenors for jobs and have no jobs or damages for loss of jobs.

The Intervenors have consistently affirmatively defended this case on the theory that the Plaintiffs have no loss because they lost their seniority and thus their

jobs by accepting severance pay. The Intervenors feel that if the Plaintiffs rely on the collective bargaining agreement they are no better off than the award of the trial court and the circuit court and in all likelihood would and should be worse off because under the severance pay argument, there are no damages owed after the date of hire because seniority was retroactively forfeited.

## III. THE PETITIONERS CANNOT NOW CLAIM THAT AN ACTUAL VOTE IS NEEDED BECAUSE NO EVIDENCE ON THE RECORD SHOWS (1) THAT THEY ASKED FOR AN ACTUAL VOTE; (2) WERE IMPROPERLY DENIED AN ACTUAL VOTE; OR (3) THAT THEY EVER ARGUED FOR AN ACTUAL VOTE AS A REMEDY IN THIS PROCEEDING.

Once the Petitioners realize that enforcing the collective bargaining agreement will put them in a worse position relative to overturning the decision of the trial court and the circuit court, then their next step will be to request an actual vote as a remedy and claim damages to the date of such vote if it is negative. Or, in the alternative, claim damages until the next succeeding collective bargaining agreement was signed approving the new seniority lists. The alternative position is not realistic for not one Petitioner ever requested arbitration over losing a job assignment. Under the contract (Article X, Section 1, *Seniority*) and the arbitration procedures (Article VI, Section 1, *Arbitration*), if there was no grievance made within seven days stating that the Petitioner/candidate had higher seniority *and* was qualified, then the grievance would be gone and the job award valid. Without any

Petitioner grievances, we can assume no job losses during the initial contract period. Thereafter, the Union accepted by actual vote the new agreement incorporating the new seniority lists which were put into evidence by the Intervenors. So not only could the Petitioners not argue that they had damages through the first contract period, but then, after the *actual* Union vote on the succeeding contract, they could not argue damages since the new seniority lists were approved by all voters entitled to vote under the Union Constitution and By-Laws (also in evidence).

But, for the sake of argument, let us state that the grievance procedures were all tainted (which the Intervenors in light of the Court approval of Doyle II do not concede), and, that the Union improperly refused a vote (which the evidence does not support), then the Petitioners argue an actual vote should have taken place.

The only problem with the approach was that the Petitioners never plead nor proved such a violation or violations and never requested such a remedy.

In absence of exceptional circumstances not argued herein, the Petitioners cannot raise an issue at the appellate level that was not raised below. See *Hormel v. Helvering*, 312 U.S. 552, 61 S. Ct. 719, 85 L.Ed. 1047 (1941) upholding the result in *Hormel v. Helvering*, 111 F.2d 1 (C.A. 8, 1940); *Trapp v. Metropolitan Life Insurance Co.*, 70 F.2d 976 (C.A. 8, 1934); *United States v. Latrobe Construction Company*, 246 F.2d 357 (C.A. 8, 1957); and *Jones v. State of Arkansas*, 929 F.2d 375 (C.A. 8, 1991).

The Petitioners could have obtained an actual vote under the Union Constitution and By-Laws and enforced

that right in a 301 action. *Woodell v. International Brotherhood of Electrical Workers, Local 71*, 112 S. Ct. 494, 116 L.Ed.2d 419, 60 U.S.L.W. 4024, 138 LRRM (BNA) 2881, 120 Lab. Cas. ¶11,010 (1992); *Merk v. Jewel Food Stores Division of Jewel Companies, Incorporated*, 945 F.2d 889, 60 U.S.L.W. 2243, 138 LRRM (BNA) 2433, 120 Lab. Cas. ¶10,972, *cert. den.*, 112 S. Ct. 1951, 118 L.Ed. 2d 555, 60 U.S.L.W. 3701, 60 U.S.L.W. 3775, 60 U.S.L.W. 3780, 140 LRRM (BNA) 2320, 121 Lab. Cas. ¶10,165 (1992).

The Petitioners did not request a vote, or, even if they had, they did not request a remedy of an actual vote and cannot do such at this late date.

## CONCLUSION

The Intervenors pray that the Court determine that the Plaintiffs have no seniority or recall rights under the collective bargaining agreement to support their claim for remedy, and based upon such a finding deny the Petition for Writ of Certiorari, or, alternatively uphold the remedy determined by the trial court and the circuit court as being correct and deny the Petition for Writ of Certiorari.

Respectfully submitted,

M. H. WEINBERG, #14435
WEINBERG & WEINBERG, P.C.
The Mark
9290 West Dodge Road
Suite 205
Omaha, NE 68114

*Attorney for Intervenors.*

No. 92-1560

In The

# Supreme Court of the United States

October Term, 1992

SELMAN (JOE) THOMAS, JR., et al.,

*Petitioners,*

vs.

METZ BAKING COMANY, BAKERY, CONFECTIONARY & TOBACCO WORKERS UNION LOCAL #433 and CURTIS BURTON, et al.,

*Respondents.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## APPENDIX OF INTERVENORS

## APPENDIX TABLE OF CONTENTS

A. Arbitration Award of James A Doyle dated December 15, 1983.... App. 1

B. Pre-Trial Order (filed April 10, 1985), *Thomas, Selman (Joe) et al., v. Interstate Brands Corporation, et al.* (Civil No. 83-0-560)..... App. 24

C. Memorandum Opinion (September 15, 1985) *Selman (Joe) Thoams, Jr., et al. v. Interstate Brands Corporation, et al.*..... App. 33

D. Agreement between Metz Baking Company, ITT Continental Baking Company and Interstate Brands Corporation and Bakery, Confectionary and Tobacco Workers Union, Local No. 433 (1983)..... App. 47

| | |
|---|---|
| IN THE MATTER OF ARBITRATION BETWEEN<br>Interstate Brands Corporation<br>and<br>Bakery, Confectionery and Tobacco Workers Union, Local NO. 433 | Grievance: Severance Pay<br>Decision and Award |

The hearing in this matter was held in Omaha, Nebraska, on October 6, 1983 before James A. Doyle, Arbitrator, appointed by mutual agreement of the parties.

Appearances

For the Company

Joe P. Cashen, Esquire
Kennedy, Holland, DeLacy & Svoboda
10306 Regency Parkway Drive
Omaha, Nebraska 68114

For the Union

Harry H. Smith, Esquire
632-640 Badgerow Building
Sioux City, Iowa 51101

Counsel for Grievants
Participating on Briefs

Dayton O. Rasmussen, Esquire
Suite 32 Executive Center
Dodge at 35th Avenue
Omaha, Nebraska 68131

## Statement of Facts

A statement of the facts leading to this proceeding will provide a frame of reference for a definition of the issues submitted to this Arbitrator for final decision.

On February 19, 1983 the Metz Baking Company, Sioux City, Iowa, entered into a contract with Interstate Brands Corporation for the acquisition of its plant, located at 2215 Leavenworth Street, Omaha, Nebraska, and also the routes associated with that plant, where it produced bakery products under the Butternut label. Metz also owned and operated a similar plant at 4383 Nicholas Street, in Omaha, where it produced bread and other bakery products under the Old Home label. At the time of this acquisition (not a merger or consolidation) Interstate had 41 fulltime and 21 parttime employees on the payroll in Omaha. Metz took possession of the Interstate plant on February 21.

Metz and Interstate were parties to identical industry wide collective bargaining agreements with the Bakery, Confectionery and Tobacco Workers Union, Local No. 433. The Union, it appears, was informed that the acquisition of the Interstate facility was in the course of negotiations and, if successful, it understood that the two plants would be operated in tandem. The purchase agreement provided that Interstate employees primarily engaged in the Company's operations in Omaha shall become employees of Metz on the date of the transfer of possession. Metz expected to operate the two plants for a period of six or eight weeks, but early in that period it decided that the former Interstate plant on Leavenworth street was not only more efficient but also better equipped than its Nicholas Street plant, and after two weeks it closed the latter except for truck storage. It consolidated the production of basic bakery products under the Old Home label in the Leavenworth plant.

In effecting this consolidation of operations former Interstate employees were treated as new hires. Metz employees received preference for available jobs on the basis of their seniority. The reorganization resulted in the layoff of about forty employees on the Interstate seniority list. Metz, however, recognized the benefit rights of such employees, namely, their accrued vacation rights, health and accident benefits and pension rights which they had accrued under the terms of the Bargaining Agreement.

A grievance was filed by employees on the Interstate seniority list in which they alleged that the seniority provisions of the contract were unfairly and improperly implemented by Metz. The Union assumed a neutral position and represented both groups of employees in the arbitration proceeding that followed. Restoration to their jobs was sought in accordance with their seniority at the time of the sale of the Interstate plant. The sole issue in that proceeding was defined as follows:

> Did the Metz Baking Company violate the seniority rights of employees of the Interstate Brands Corporation when it acquired the assets of that Company, consolidate operations, and treated such employees as new hires?

On June 7, 1983 this Arbitrator denied the grievance and upheld the Company's action in relegating the former Interstate employees as new hires to the bottom of the Metz seniority list in the absence of any agreement to the contrary.

On July 29, 1983, thirty-six of the former employees of Interstate, as individuals filed an action in the United

States District Court, District of Nebraska, against Interstate Brands Corporation and Bakery, Confectionery and Tobacco Workers Union. The substantive allegations of the complaint relevant here are as follows:

> Article 34 of the Bargaining Agreement provides for payment of severance pay to an employees who is displaced from employment by reason of a closing of an entire plant and who has been employed for a period of three years. The sale of the plant in Omaha by IBC to Metz Baking Company is a "closing" within the meaning of Art. 34, Sec. 1 of the agreement, which entitles plaintiffs to said severance pay on the date of sale on February 19, 1983. None of the exceptions of Art. 34, Sec. 2 apply to any of the Plaintiffs.
>
> Defendant IBC cannot transfer its obligation for severance pay under its contract with these employees through the device of a sales agreement with Metz. For a novation of such a contract to occur, there must be agreement thereto by all three parties concerned. There exists no such agreement.

As an affirmative defense to the issue raised by such allegations the Union relies upon the provisions of Article VI of the Collective Bargaining Agreement which states that a dispute between the Union and the Employer with reference to the proper interpretation or application of the provisions of the contract shall be referred to arbitration. The filing of a grievance by the Union invoked this proceeding, to which Interstate interposed no objection.

Section XXXIV of the Bargaining Agreement which is the subject of interpretation in this proceeding provides as follows:

## Article XXXIV

## Severance Pay

Section 1. It is agreed that each regular full time employee who is displaced from his or her employment by reason of the closing of an entire plant, or the introduction of labor saving equipment, shall be compensated for such displacement providing they have been actively employed by the Employer for a period of at least three (3) years. An eligible employee's compensation for their displacement shall be on the basis of thirty (30) hours of severance pay (at their straight time hourly rate of pay) for each full year of actual employment, commencing with the fourth (4th) year thereof. Payment under this formula shall be limited to a maximum of nine hundred (900) hours severance Pay.

Section 2 The above described Severance Pay will not be paid to:

1. Any employee who is offered employment with the Company in another plant or the Employer which is located within a reasonable distance from the employee's place of employment.

2. Any employee who accepts a job with the Company at any location.

3. Any employee who voluntarily quits or is discharged for just cause before he is separated from employment by the Company.

4. Any employee, who at the time of separation, is eligible for a Normal Pension, as provided for under the provisions of the

Bakery and Confectionery Union Local 433 Industry Pension Fund.

5. If an employee subject to Severance Pay is eligible to receive an early retirement or disability pension benefit under the Bakery and Confectionery Workers Union Local #433 Industry Pension Fund, whether or not he or she elects to accept such early retirement or disability benefits, he or she shall receive as severance pay that percentage of severance pay as set forth above which the excess of the Normal Pension Benefit under such Pension Plan over the amount of early retirement or disability benefit, to which he or she is then entitled bears to the Normal Pension. For example, if the Normal Pension Benefit is $100.00 and an employee is entitled to an early retirement or disability benefit of fifty-eight dollars ($58.00), then his or her severance pay will be reduced by fifty-eight percent (58%).

6. Any employee accepting Severance Pay shall forfeit and cease to have any seniority and recall rights as provided by in this Agreement.

7. Any employee re-employed after receiving Severance Pay shall be considered a new employee form the date of re-employment.

8. In the event an eligible employee wishes to remain on the plant seniority list, for the purpose of possible recall, he or she may elect or defer acceptance of his Severance Pay for a period of twelve (12) month. At any time during such period, however, he or she may request their Severance Pay and

their right of recall and seniority shall terminate as of that date.

9. If any such employee has not been recalled by the end of such period, he or she shall be paid Severance Pay and their right or recall and seniority shall terminate as of that date.

The main issue for resolution and final decision by this Arbitrator is as follows:

> Did Interstate Brands Corporation violate Section 34 of the Bargaining Agreement by its refusal to grant Severance Pay to employees at its Omaha plant upon the sale of that plant to Metz Baking Company and the transfer of its employees to that Company? If so, what is the appropriate remedy?

Provisions of the Agreement of Purchase and Sale of Assets to which reference is made as having some relevance to the issue are as follows:

> Section 10 – Transferred Employees
>
> 10.1 – All of Seller's employees who are primarily engaged in the conduct of the Subject Operations as of the Transfer Date shall become employees of Buyer on the Transfer Date (the "Transferred Employees"), and Buyer shall become the successor employer under, and shall use its best efforts to obtain novations with respect to each of the collective bargaining agreements identified in Exhibit D hereto. Seller agrees to make full and final settlement with the Transferred employees, as of the Transfer Date, with respect to wages, salaries, union dues, contributions to welfare and employee benefit plans, payroll taxes, premium pay and all other obligations relating to their employment by

Seller, to and including the Transfer Date, except for the accrued vacation rights, if any, of the Transferred Employees, which rights Buyer agrees to recognize and honor subsequent to the Transfer Date, and except for contingent work week credits not yet due and payable. At such time as contingent work week credits become fully earned, by and payable to, the Transferred employees, Buyer shall pay the same and shall prepare a schedule, on an individual employee basis, of the amount of work week credit payable to each of the Transferred Employees and deliver such schedule to Seller. Seller shall promptly verify the amounts due the Transferred Employees and pay to Buyer the amount of such work week credits payable to the Transferred Employees which related to periods on or prior to the Transfer Date.

10.3 – Notwithstanding the foregoing, in the event that any claim is made against Seller, by reason of Seller having been a party to any of the collective bargaining agreement identified in Exhibit D hereto, or for severance or termination pay under or pursuant to any of said agreements by reason of the transfer of any employees to Buyer, the termination of any of the Transferred Employees by Buyer or the termination of any employees by Seller at a request of Buyer, Buyer shall indemnify and save Seller harmless from and against all such claims, including all costs and expenses of defending against any such claims and any and all liabilities arising therefrom. Nothing contained therein shall be deemed or construed to require Buyer to continue to employ any of the Transferred Employees during any period following the Transfer Date.

**Position of the Parties**

The Union contends that Article XXXIV, Severance pay, is clear and unambiguous. The Interstate Brand employees have been displace from their employment with Interstate. Interstate has closed its entire plant in Omaha. The Company has not offered such employees employment in any other Interstate Plant, and none of such employees has quit or been discharged for cause. The fact that some, but not all, were employed by Metz is irrelevant and immaterial. Metz was not under any obligation to employ any of the Interstate employees under the contract of acquisition.

The basic position of Interstate Brands is that the Leavenworth plant was not closed by either the seller or the buyer. The transaction involved a disposition of assets which would not result in the closing of that plant or result in a displacement of employees which would trigger possible claims for severance pay. The contract involved a transfer of its employees to the buyer and under the Bargaining Agreement Article XXXIV would apply only in the event of the physical closing of the Leavenworth Plant. It argues that the severance pay clause has reference to the "closing" of a plant as distinguished form the sale of a plant to a buyer who continues its operation.

**Discussion**

The decision in this cases hinges on the intent of the parties expressed in Article XXXIV of the bargaining agreement between Interstate Brands, as seller, and the

Union. The agreement is one negotiated jointly by members of the industry, each of which individually signed identical agreements. The issue is presented in the background of a bilateral agreement between Interstate Brands, as seller, and Metz Baking Company, as buyer, in which the Union played no role. There does not appear to have been any discussion of severance pay in the course of the negotiations resulting in the sale of the Interstate plant in Omaha to Metz. The witness for the Company in this proceeding testified that the provisions of Section 10.3 of the contract of sale in which the buyer agreed to indemnify the seller in the event of any claim made against the seller by reason of the seller having been a party to the collective bargaining agreement, including "severance or termination pay" was a "boiler plate" provision which appeared in prior sales agreements. It does not appear that the parties addressed the likelihood of the assertion of any such claims. With respect to Article XXXIV, the testimony indicated that such a provision first appeared in the industry contract in Sioux City in 1963, in which the parties here were involved. The President of the Union testified that it was a standard provision in other international contracts, the purpose of which was to assure some payment to employees if a plant closed down. It was inferred that the provisions of Section XXXIV also entered the bargaining agreements in Omaha about 1963.

It is a familiar rule that if the language the parties have chosen to express their intent is clear and unambiguous there is no room for interpretation and the plain meaning of the language must be given effect. If,

however, the language employed is ambiguous, and susceptible to more than one meaning, resort to parol evidence may be had to interpret the contract. It has been said that whether a document is or is not ambiguous is a matter of impression rather than of definition. *Elkouri and Elkhouri* (3ed) p. 196. Often general words are used which may apply suitably to circumstances which the parties did not address specifically in their negotiations. An ambiguity usually means that the parties did not express themselves with clarity. The Arbitrator's job is to determine and carry out the mutual intent of the parties as if they had foreseen the event that gave rise to the dispute. The language of Article XXXIV is susceptible to more than one interpretation and, therefore, in the judgment of this Arbitrator is ambiguous.

Provisions for severance or termination pay are not uncommon in collective bargaining agreements. In the interpretation of the Agreement in this case, inquiry should be directed first to the underlying purpose of such provisions. Obviously they define an economic benefit to employees who meet the qualifications the parties have agreed upon. Under the contract severance pay is limited to full time employees who have been actively employed for at least three years. The benefit is limited to 30 hours of severance pay as their straight time hourly pay for each full year of employment beginning with the fourth year, with a limit of 900 hours of severance pay.

The qualifying event which is the condition precedent to payment of the benefit to an employee is expressed as the "displacement" from his or her employment by reason of the "closing" of an entire plant. When is an employee "displaced from employment", and when

is a plant "closed", are the critical terms involved in the interpretation of the contract.

We begin our search for the underlying purpose of such provisions for severance or termination pay with the decision of Arbitrator Willard Wirtz who held that rights and obligations under a severance indemnity claim are rights and obligations covering services already performed which survived a discontinuance of the employer's business after the collective bargaining agreement had expired. In support of his conclusion, he cited a number of judicial decisions, chief among them, *Owens v. Press Publishing Co.*, 20 N.J. 537, 120 A. 2d 442 (1956) in which the court held that such payments are "accrued and earned". Severance pay, the court said is in the real sense. . . . remuneration for the services rendered during the period covered by the Agreement. The Arbitrator pointed out that the only cases suggesting a different rationale are those in which severance payments are analyzed as being in the nature of "liquidated damages" to cover the costs to an employee incident to his being put out of his job.

In *Adams v. Jersey Central Power & Light Co.*, 120 A 2d, 737 (1955) the Associated Gas & Electric Company sold its gas business to the New Jersey Natural Gas Company. All the employees in the gas operation of the seller were to be given the opportunity to continue employment with the buyer. The collective bargaining agreement provided that "severance pay" benefits shall be applied as follows:

> "Regular employees who have completed one (1) year or more of continuous service and who are permanently released from employment because of reasons beyond the control of the

> employees concerned shall be given an allowance of one (1) week's base pay at the rate of pay at the time of release for each full year of continuous service."

The contract of sale provided that the buyer will endeavor to employ the personnel presently employed by the seller. It also provided that the buyer would recognize credits accumulated under the seller's pension plan.

In sustaining the claims of employees against the seller the court stated:

> "To say that severance pay provisions provide only against "loss of employment" rather than a mere change in the identity of the employer is to disregard the words of the contract for words are symbols of ideas. It is not a gratuity but a compensation earned by service, and therefore contributes much to the maintenance of the good will of employees and the community generally."

In *Dahl v. Brunswick Corp.*, 356 A. 2d 221 (1976). Brunswick sold its Yacht division to Test Corporation. No collective bargaining agreement was involved but Brunswick had a policy that provided that severance pay would be granted to employees who were involuntarily terminated. Involuntary termination was defined as any separation for an indefinite period (more than thirty days) for actions not within the control of the employee when no other suitable opening is available.

At the time of sale employees were told they would be employed by the buyer and that the buyer would continue the seller's policy with respect to severance pay.

In sustaining the plaintiff's claim against Brunswick, the Court stated:

> "Although there is a dearth of Maryland authority on the point, there is ample support elsewhere for the position that when part or all of a company is sold and the employees told that they cannot remain with their old employer, their employment has been terminated even though they immediately being to work for new owners."

The Court rejected Brunswick's argument that the phrase "no other suitable opening is available" referred to any job, not simply those available at Brunswick.

In *Matthews, et al. v. Minnesota Tribune Company,* 10 N.W. (2D) 230, the Tribune sold its assets and ceased publication. This Court stated "the authorities are almost unanimous that when an employee disposes of his business the sale and transfer operates as a discharge of its employees."

Arbitrators have had occasion with some frequency to deal with the intent and purpose of severance pay claims in relevant situations.

In *M & T Company,* 69-1 Arb Par 8085, 51 LA 504, the Arbitrator defined severance pay as terminal compensation measured by services given during the subsistence of the collective bargaining agreement. In this case the employer lost a bid on a construction job and most of the employees continued work uninterruptedly with the successful bidder. The Arbitrator awarded severance payment despite the fact that the employees continued to perform the same jobs and lost no time.

In *International Paper Company*, 79-1 Arb Par 8201, the Company sold a plant that it had considered closing. The buyer wanted to be assured of employees. They faced restricted options with the seller, namely the loss of employment or transfer to another plant. Twenty two employees the buyer did not want transferred to another plant of the seller and six were given severance pay. The remaining 145 who continued employment with the buyer were not paid. The severance policy in effect provided that "employees with one year or more of service will be eligible for severance pay when laid off by Company action because there is no work available to which their seniority entitles them. The Arbitrator concluded that the phrase "no work available" meant work with the seller and awarded severance pay to the 145 employees who continued work without interpretation as employees of the buyer at the same plant. He rejected the argument that the employees were merely transferred to another employer instead of laid off by the seller.

The Arbitrator pointed out that the buyer assumed no responsibility for previously accrued severance pay, and the transfer of the employees had the effect of extinguishing whatever accrued rights the employees previously had as employees of the seller. He said that of the 145 employees offered employment by the buyer all but three went to work and were entitled to severance pay from the seller. He stated that it was his firm impression that the conclusion he had reached "was generally in accord with prior decisions", citing *Amdel, Inc.*, 74-2 Arb Par 8610 and cases cited.

In *Meadows Gold Dairies*, 69-2 Arb Par 8634, 51 LA 741, the Arbitrator held that in the sale of routes to other

companies the milk route drivers who accepted the opportunity to continue working their routes for the buyers were due severance pay. He held that the Company Grievance Pay Plan was to assist financially an employee whose employment is terminated by the Company through no fault of the employee. Eligibility was limited to full time employees who were permanently terminated. The Company's sale effectively eliminated them.

In *H.K. Porter Co.*, 49 LA 147, Arbitrator Cahn held that employees who had accumulated three or more years of continuous service were entitled to severance pay even though the bargaining agreement had expired before the Company closed the plant.

This review of arbitral and judicial precedents concludes with *Ward Foods, Inc.*, 73-2 Arb Par 8458 (1973). This case involved the interpretation of severance pay provisions in the bargaining agreement with Bakery & Confectionery Workers, Local 50, the relevant provisions of which are identical to the provisions of Article XXXIV. The initial paragraph provides:

> "(a) It is agreed that each fulltime employee who is *displaced* from his employment by reason of the *closing of an entire plant*, a department or any section thereof, or the introduction of labor saving equipment of by layoff shall be compensated for such displacement providing he has been actively employed by the Employer for a period of at least three years. . . . "

Ward Foods, Inc., sold its Newark, New Jersey, business (inventory, parts, supplies, contracts, etc.) but not its real estate, to Silvercup Bakers, Inc. The buyer agreed to

continue the Newark operations with materially the same employees for a period of two years. Ward did not give termination notices to its employees when the buyer assumed operation of the Newark plant.

The Arbitrator held that Ward Foods, Inc., was liable for severance pay to the employees at the Newark plant on the ground that they had been displaced by the sale and transfer of operations to Silvercup. He stated:

> "Further, the use of the phrase "displaced from his employment" in this cited provision of Article VIII requires reference to Article I for a determination of the meaning of the work "employment". That provision makes it clear that the "employment" that is covered there and by subsequent terms of the Agreement is confirmed to the relationship established between Ward Foods, Inc., as the Employer and its own particular employees. If that confined "employment" relationship ceases to exist for reasons not the fault of the employee, it seems reasonable to the Arbitrator to conclude that the employee is "displaced from his employment" within the meaning of Article VIII, Section (a)".

The Arbitrator supported the conclusion that the employees had been displaced from employment by stating his conclusion would have been different if the "disqualifications" in Section 2 (their Section b) included a reference to employees who secure employment at the same location with a successor company. The cessation by Ward of its operation at Newark constituted a "closing of an entire plant" within the meaning of Section 1.

The Arbitrator acknowledged that the award of severance pay "will understandably" be deemed a "windfall by Ward", but he reasoned:

> "But the Arbitrator in this instance is bound by the specific terms of Article XIII of the Agreement, and cannot read into them something which is not there. There is no indication that the parties equated severance pay with payment to an employee who has permanently lost all opportunity of reasonably equal employment at the Newark location of the Company's former plant, or who has suffered a significant period of unemployment and privation while seeking another job. If the parties intended that severance payments should be made only under such circumstances, they would have made that intent clear in Article XIII, Section (a). . . . since "employment" under this provision could only reasonably be construed to contemplate employment with Ward Foods, Inc., the unilateral substitution of some other Employer by Ward did not constitute a continuation of "employment" within the meaning of this provision."

Extensive review of both judicial and arbitral decisions lead to the following conclusions. First, severance pay is recognized as a benefit accrued for services rendered. A minimum of three years of fulltime service is a condition precedent to the accrual of benefits beginning with the fourth year of service. Second, severance pay provisions are the result of collective bargaining. Third, accrued severance pay is enforceable although the event that triggers liability occurs after the expiration of the bargaining agreement. Fourth, the purposes of severance

pay provisions have been held to be: (a) earned compensation upon termination for service rendered; (b) payment to ease the financial burden of the employee while seeking a new job; (c) liquidated damages for loss of job or to alleviate the consequences of the economic adjustment and; (d) partial compensation for loss of seniority rights and other benefits.

In this case Interstate Brands is the seller. The contract of sale and transfer of title and possession to its plant and routes in Omaha to Metz terminated its operation in that city. Its employees became new hires of the buyer and suffered the loss of seniority rights accrued under the bargaining agreement with Interstate. Their employment relation with the seller was severed. The seller offered them no options with respect to continued employment. In every legal sense they were terminated through no fault of their own, and in the ordinary and well understood sense of the term, displaced. Insofar as the seller is concerned the Omaha plant was closed as effectively as if it had voluntarily locked the doors and ceased the production of bakery products at that location. The fact that the contract of sale referred to a transfer of its employees to the buyer is irrelevant. The Union was not a party to the negotiations and did not participate in consultation relating to the rights of employees to severance pay. There is no evidence establishing any waiver of the rights of its members to severance pay, or any conduct estopping it from asserting such rights on their behalf (*Amdel, Inc*, 74 72 Arb Par 8610). The Arbitrator is fully convinced that the employees were displaced in the closing of an entire plant and the fulltime employees with

more than three years of employment meet the qualifications for severance pay defined in Article XXXIV under any theory of the purpose of such clauses. In fact they qualify on two basic grounds, first that they earned such pay on the basis of service to Interstate Brands, the seller, and on the ground that it is partial compensation for loss of their seniority rights and the economic insecurity attending such loss. These conclusions find further support in the fact that the loss of severence rights in the event of sale and continued employment with the buyer does not appear in the disqualifying events in Article XXXIV. The underlying reasons relied upon find support in the vast majority of cases, arbitral and judicial, which research has exposed.

In view of the conclusion expressed above, a subsidiary issue to which the parties addressed themselves remains. Section 2(e) of Article XXXIV defines a formula for computing the amount of severance pay due those fulltime employees who are eligible for early retirement. Section 2(d) which provides that any employee who is eligible for a normal pension at the time of separation is not eligible for severance pay, is not an issue in the proceeding. The effect of Section 2(e) is to discount the amount of severance pay an employee eligible for early retirement would receive.

The Union contends that this provision discriminates against this group of employees in violation of 29 U.S.C. 632 (a) (1) and, therefore, is invalid and should not be enforced in this proceeding. The only judicial decision tendered in support of this proposition is a decision of the United States District Court of Arizona in an action

initiated by the Equal Employment Opportunity Commission against *Bordens, Inc.*, (EEOC v Bordens, Inc. December 7, 1982). The district court held that a similar provision providing for an offset in computing the severance pay for employees eligible for early retirement established a neutral policy, but the application of it had a disparate impact on the vested rights of employees subject to it. The injection of this legal issue in the arbitration proceeding raises a question of the authority of the Arbitrator to interpret and apply the law in deciding the case.

The Arbitrator derives his authority from the bargaining agreement and the issues submitted to him for decision. Article VI of the Agreement defines a dispute submissible to arbitration for final resolution as one involving the proper interpretation or application of the contract. Elkouri devotes a chapter on the subject of the use of substantive rules of law and sums up the prevailing view of the Arbitrator's authority as follows: (*Elkouri, How Arbitration Works*, 3 ed p 321, 324)

> "Unless the parties specifically limit the power of the Arbitrator in deciding various aspects of the issue submitted to him, it is often presumed that they intend to make him the final judge on any questions which arise in the disposition of the issue, including not only questions of fact but also questions of contract interpretation, rules of interpretation, and questions, if any, with respect of substantive law. . . . On the whole, relatively wide discretion is left to arbitrators to deal with the law according to their best judgment."

The evidence establishes that the severance pay provision, including the text of Section 2(e), was adopted in

industry contracts in 1963. This case appears to be the first instance in which the validity of Section 2(e) has been challenged.

In addressing the issue an Arbitrator must start with a presumption of the validity of the provision the parties have adopted in collective bargaining. If it is clear that the contract violates an applicable statute the Arbitrator should not ignore it, but an Arbitrator should seek to avoid a construction that would render the agreement invalid. Benefit rights under severance clauses differ from pension benefits. Their purposes are different. Severance pay provisions like Article XXXIV that deny rights to employees eligible for a normal pension are recognized as valid. *See West Penn Power Co.*, 62 LA 488. The provisions in questions here reduce the severance benefit of those who are eligible for early retirement. They have an option. That such a provision violates the Equal Employment Opportunity Act is not clear. The Union is in the position of challenging the validity of the provisions it has jointly negotiated. The validity of the contract the Arbitrator is called upon to interpret should not be denied in the absence of authoritative judicial decisions. The only decision referred to by the Union is the decision of a lower federal court which is not final and binding in this proceeding. It is understood, however, that if the decision was the final decision of an appellate court holding that such a provision violates federal law, it would control the result in this case. It should be observed that the case referred to is one instituted by the agency charged with the enforcement of the Act, and some arbitrators share the view that such public policy issues should remain with the agency and the courts for

enforcement and final determination. In the absence of any authoritative decision establishing the invalidity of the formula adopted by the parties for determining the amount of the severance benefit, and in reliance upon a presumption of its validity, it is the conclusion of the Arbitrator that Section 2 (e) of Article XXXIV should be applied in determining the severance pay due those full-time employees who were eligible for early retirement when they were terminated as a result of the sale and transfer of the plant where they were employed.

**Award**

In accordance with the reasons set forth herein, the Arbitrator's award is as follows:

1. All fulltime employees of Interstate Brands, Inc., at its facility in Omaha, Nebraska, on the date its plant and other assets were transferred to Metz Baking Company are entitled to and shall be paid severance pay in accordance with Article XXXIV of the Bargaining agreement.

2. Those fulltime employees who were eligible for early retirement on the date of transfer shall be paid severance pay calculated in accordance with Section 2(e) of Article XXXIV of the Agreement.

Jurisdiction is retained to resolve any disputes which may arise in the course of the administration and application of this award.

Dated this December 15, 1983.

/s/ James A. Doyle
Arbitrator

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

| | |
|---|---|
| THOMAS, SELMAN (JOE), et al., Plaintiffs, vs. INTERSTATE BRANDS CORPORATION, et al., Defendant. | Civil Action File NO. 83-0-560 PRE-TRIAL ORDER (Filed APR 10 1985) |

The final pretrial conference was held on this 11 day of December, 1984. Appearing for the parties as counsel were:

Plaintiffs,

*Thomas Selman et al.,*
Dayton Rasmussen, Esq.
3929 Harvey Street – Suite 106
Omaha, NE 68131

Defendant,

*Metz Baking Company*
Joe P. Cashen
Of KENNEDY, HOLLAND,
DeLACY & SVOBODA
10306 Regency Parkway
Omaha, NE 68114 (402) 397-0203

Defendant,

*Interstate Brands Corporation*
Joe P. Cashen
Of KENNEDY, HOLLAND,
DeLACY & SVOBODA
10306 Regency Parkway
Omaha, NE 68114 (402) 397-0203

Defendant,

*Bakery, Confectionary and Tobacco Workers Union, Local No. 433*
John F. Clemons
508 Davidson Building
Sioux City, Iowa 51101

and,

Harry H. Smith
SMITY & SMITH
632-640 Badger Row Building
Sioux City, Iowa 51101

*Bakery, Confectionary and Tobacco Workers Union, International AFL-CIO*
Never filed an answer or had counsel enter an appearance in this case.

A.

Exhibits in Evidence

The following exhibits are received in evidence without objection and no formal offer need be made of them. Exhibits are numbered and listed in Exhibit A attached hereto and made a part hereof.

B.

Foundation for Exhibits

Foundation for the following exhibits has been stipulated or waived. See Exhibit A.

C.

Parties have agreed that the following may be accepted as established facts for purposes of this case only.

February 19, 1983, the Metz Baking Company, Sioux City, Iowa, entered into a contract with Interstate Brands Corporation for the acquisition of its plant located at 2215 Leavenworth Street, Omaha, Nebraska, where it produced bakery products under the Butternut label. Metz also owned and operated a similar plant at 4383 Nicholas Street, in Omaha, where it produced bread and other bakery products under the Old Home label.

Metz and Interstate were parties to identical industry-wide collective bargaining agreements with the Bakery, Confectionary and Tobacco Workers' Union, Local No. 433. Subsequently, Metz consolidated the production of basic bakery products under the Old Home label in the Leavenworth plant.

In effecting this consolidation of operations, former Interstate employees were treated as new hires. Metz employees received preference for available jobs on the basis of their seniority. Reorganization resulted in the layoff of about 40 employees on the Interstate seniority list.

A grievance was filed with respect to the list, and on June 7, James A. Doyle, arbitrator denied the grievance on behalf of the Interstate employees and upheld Metz's action in the handling of the seniority issue.

On July 29, 1983, 36 of the former employees of Interstate, as individuals, filed this action in the United

States District Court of Nebraska against Interstate Brands Corporation and Bakery Confectionery and Tobacco Workers' Union. It is alleged that the sale of the plant in Omaha by IBC, to Metz Baking Company was a "closing" within the meaning of Article 34, Section 1, of the Collective Bargaining Agreement which entitled Plaintiffs to severence pay from the date of the sale.

Thereafter, a grievance was filed and on October 6, 1983, a hearing was had before James A. Doyle, arbitrator, which resulted in the decision on December 15, 1983, a copy of which is attached to the First Amended Petition and marked as Exhibit B thereto, which decision ordered IBC to pay serverence pay pursuant to the terms of the Agreement's Article 34.

Thereafter, Metz Baking Company was made a party defendant in this action as the contractual indemnifier of IBC in matters concerning serverence pay for the Plaintiffs. Interstate and Metz did not appeal that award and the same is final and binding with respect to them.

Metz Baking Company, in keeping with the award, computed the amount due each of the Plaintiffs in accordance with the terms of the Agreement. The amounts as computed are not in dispute. The Plaintiffs were advised that drafts had been issued on February 9, 1984, in the proper amount, payable to each of the Plaintiffs, and were advised that each individual would have to sign a Release and Receipt acknowledging receipt of their particular amount of severance pay and thereby agreeing the formula, including the anniversary date and termination dates were correct in arriving at the particular dollar

amount. Thereafter, counsel for Interstate Bakery, Confectionary, and Tobacco Workers' Union, Local 433, and Marlin Lessman on behalf of Metz Baking and Interstate Brands Corporation undertook negotiations with respect to the form of Release to be executed. Ultimately, the form of the Release was agreed upon by counsel for the Union and Metz Baking Company.

Approximately 50 percent of the Plaintiffs have accepted their severance pay. The names of such Plaintiffs and the amounts paid are shown on Exhibit 6 and they have executed copies of Release, Exhibit 8. That the remaining Plaintiffs have refused to accept payment on the basis of refusing to sign the Release which they allege is improper.

D.

Controverted and Unresolved Issues

The issues remaining to be determined and unresolved matters for this Court's attention are.

1. Is Metz Baking Company entitled to Receipt and Release upon payment of the severance pay?

2. Does the receipt as required by Metz constitute a waiver and release of *all rights*, causes of action, against Metz rather than a release of serverance pay rights.

3. Was the negotiated Release, Exhibit 7, oppressive and in bad faith or a breach of the Bargaining Agreement?

4. If Plaintiffs prevail, are they entitled to interest, attorneys' fees, and costs, or any portion thereof?

5. Did the unions fail in their duty to fairly represent Plaintiffs by negotiating and agreeing to the release as worded, i.e., giving up right to seniority suit, now before United States District Court.

E.

All witnesses, whom the Plaintiff expects to call to testify, except those who may be called for impeachment purposes only, are:

1. Selman Thomas, 1009 So. 27th St., Omaha, NE 68105

2. James Walker, 6305 No. 48th St., Omaha, NE 68104

3. Dave Bell, 1708 "H" St., Omaha, NE 68107.

All witnesses whom the Defendants, Interstate Brands and Metz Baking Company expect to call to testify, except those listed in the preceding paragraph as expected to be called by the Plaintiff:

1. Marlin Lessman, Sioux City, Iowa, Vice-President, Secretary, and General Counsel, Metz Baking Company;

2. Harry Smith, Sioux City, Iowa, Counsel for Bakery, Confectionery, and Tobacco Workers' Union Local 433, and

3. Bernard Clausen, President, Bakery, Confectionary, and Tobacco Workers' Union, Local No. 433.

It is understood that, except upon a showing of good cause, no witness whose name and address does not appear herein, shall be permitted to testify over objection for any purposes except the impeachment.

F.

Parties do not anticipate the use of any expert witnesses.

G.

Depositions And Other Discovery Documents

No depositions, answers to written interrogatories or requests for admission are expected to be offered in evidence.

H.

Length Of Trial

Counsel estimates the trial will consume not less than one day; not more than one and one-half days, and probably one day.

THOMAS SELMAN (JOE), et al.,
Plaintiffs,

BY: D Rasmussen
Dayton Rasmussen
3929 Harvey Street, Suite 106
Omaha, NE 68131

INTERSTATE BRANDS CORPORATION, and METZ BAKING COMPANY,
Defendants,

BY: Joe P. Cashen
Joe P. Cashen
KENNEDY, HOLLAND, DeLACY & SVOBODA
10306 Regency Parkway Drive
Omaha, NE 68114 (402) 397-0203

BAKERY, CONFECTIONARY and TOBACCO WORKERS' UNION, LOCAL NO. 433,
Defendants,

BY: John F. Clemen
John F. Clemen
508 Davidson Building
Sioux City, Iowa 51101
(712) 255-9562

and,

Harry H. Smith
632-640 Badgerow Building
Sioux City, Iowa 51101
(712) 255-8094

(EXHIBIT "A")

| | |
|---|---|
| Exhibit No. 1 | Union Agreement |
| Exhibit No. 2 | Decision & Award |
| Exhibit No. 3 | Letter, January 11, 1984, Lessman T, Union President & Counsel |
| Exhibit No. 4 | Hold Harmless Agreement, Metz-Interstate Brands |
| Exhibit No. 5 | List of Employees and amounts of severance pay |
| Exhibit No. 6 | List of Employees paid and amounts |
| Exhibit No. 7 | List of employees unpaid and amounts |
| Exhibit No. 8 | Copy of Release and Receipt |
| Exhibit No. 9 | Severance Pay Computation Sheet |
| Exhibit No. 10 | Letter, February 1, 1984, Harry Smith to Bernard Clausen |
| Exhibit No. 11 | Letter, May 15, 1984, D. Rasmussen to Union Counsel |
| Exhibit No. 12 | |

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

| | | |
|---|---|---|
| SELMAN (JOE) THOMAS, JR., *et al.*, Plaintiffs, | ) | CIVIL NO. 83-0-560 |
| vs. | ) | MEMORANDUM OPINION |
| INTERSTATE BRANDS CORPORATION, *et al.*, Defendants. | ) | (Filed SEP 15 1985) |

ROBINSON, Senior Judge.

THIS MATTER comes on for determination following an evidentiary hearing before the Court on May 16, 1985 and the submission of briefs. At the hearing the plaintiffs and defendants Metz Baking Company (hereinafter Metz), Interstate Brands Corporation (hereinafter Interstate), and Bakery, Confectionery and Tobacco Workers' Union, Local No. 433 (hereinafter Union or Local 433) were represented by counsel.[1] Jurisdiction is conferred on this Court by the Labor-Management Relations Act, 29 U.S.C. Section 185(a) and (c). This Memorandum shall constitute the Court's findings of fact and conclusions of law as required by Fed.R.Civ.P. 52(a).

## I.

## INTRODUCTION

The following uncontradicted facts provide a backdrop for this action and were essentially taken from the pretrial order (Filing No. 11).

Prior to February, 1983, defendants Metz (principal place of business in Sioux City, Iowa) and Interstate produced bakery products under the respective labels of "Old Home" and "Butternut" at two different plants in the Omaha area. Metz's "Old Home" plant is located at 4383 Nicholas Street and Interstate's "Butternut" plant was located at 2215 Leavenworth Street. Both companies were parties to identical industry-wide collective bargaining agreements with co-defendant Local 433, of which all plaintiffs in this action were members.

On February 19, 1983, Metz purchased Interstate's Omaha plant which produced bakery products under the "Butternut" label. Following this acquisition, Metz consolidated the production of basic bakery products under its Old Home label in its Omaha plant. As a result of the consolidation of the two plants, former Interstate employees were treated as "new hires," while Metz employees received preferences for available jobs on a seniority basis. This reorganization caused about 40 employees on Interstate's seniority list to be laid off. A grievance was filed with respect to the layoff. On June 7, 1983, arbitrator James A. Doyle denied the grievance made on behalf of the Interstate employees and upheld Metz's handling of the seniority issue.

The present action was then filed in this Court by 36 former Interstate employees against Interstate and Local 433. The complaint alleged that Interstate's sale of its Omaha plant to Metz was a "closing" within the meaning of Article 34, Section 1 of their collective bargaining agreement and, therefore, they were entitled to severance pay from the date of the sale.

After another grievance was filed, the matter was submitted to arbitration and a hearing was held on October 6, 1983, before arbitrator Doyle. The arbitrator's December 15, 1983 decision awarded severance pay, in accordance with the Bargaining Agreement's terms, to Interstate's full time employees who worked at the Omaha plant on the date the plant was transferred to Metz.[2] (Filing No. 9, Exhibit B to plaintiffs' First Amended Petition at 23).

Metz was subsequently made a party defendant to the action in this Court as the contractual indemnifier of Interstate with regard to the issue of plaintiffs' severance pay. Metz then computed the amount due each employee according to the Agreement's terms. These amounts themselves are not in dispute. Drafts in the proper amounts were issued to each of the individual plaintiffs on February 9, 1984, and Metz advised them that before they could receive their checks each person would have to sign a "Release and Receipt," acknowledging receipt of their particular amount of severance pay and thereby agreeing the formula, including the anniversary and termination dates, was correct in computing the severance pay. After plaintiffs were so advised, counsel for Interstate, Metz, and Local No. 433 undertook negotiations as to the form of the Receipt that would be executed and the Receipt's final form was agreed upon by counsel for Metz and Local No. 433.

Only half of the individuals entitled to severance pay have signed the form and accepted their pay.[3] The remaining named plaintiffs refuse to sign the "Release and Receipt" form, arguing it is improper, and have refused to accept payment of their severance pay.

The controverted issues that were pending prior to the May 16 hearing included: 1) whether Metz is entitled to a Release and Receipt upon paying the severance pay; 2) whether the Release and Receipt waives all the plaintiffs' rights against Metz or just the severance pay rights; 3) whether the Release and Receipt was negotiated oppressively, in bad faith or in breach of the bargaining agreement; 4) attorney's fees for plaintiffs; and 5) whether the union fairly represented the plaintiffs in the negotiations of the Release and Receipt.

Testimony and evidence adduced at the hearing has honed these issues down to one: whether plaintiffs are entitled to attorney's fees. After exhibits 1-10 were received without objection, plaintiffs rested without calling any witnesses or presenting any additional evidence contending that a cause of action had been stated on the unresolved issues. The Court reserved ruling on defendants' motions for directed verdict and several witnesses testified for defendants. Although the Court has concluded that all of the above issues must be resolved against the plaintiffs and in favor of the defendants, for the sake of thoroughness each issue will be addressed.

## II.

## FINDINGS OF FACT

Issues 1 and 2:

Plaintiffs' counsel argued at the hearing on this matter that the "release of all claims" phrase contained in the "Release and Receipt"[4] was intended by Metz to be a release of all the plaintiffs' claims, including those in a

collateral case entitled *Thomas, et al. v. Bakery, Confectionery, and Tobacco Workers Union Local No. 433, et al.*, No. CV 83-00652 (D.Neb. filed Sept. 7, 1983). This issue regarding the extent of the Receipt's release provision was resolved when counsel for Metz and Interstate, Joe Cashen, stated at the May 16, 1985 hearing that the receipt does not relate to or have any effect on future rights of the employees with regard to future severance pay, or claims that might arise in the companion case. Cashen further indicated that Metz was willing to change the Receipt and that the form the employees are required to sign represents only a receipt.

The parties subsequently agreed, during a recess of the May 16 hearing, to a revision of the Receipt. Said revision is acknowledged by Mr. Cashen on behalf of Metz and Interstate and by Mr. Rasmussen on behalf of the plaintiffs.[5]

Due to Mr. Cashen's representations and the parties' subsequent agreement as to the form of the Receipt and the limited nature of its release provision, the Court finds that Metz is entitled to the Release upon payment of the severance pay. Issue Number 1 in the pretrial order is therefore resolved by agreement of the parties. The Court further finds that the Receipt (either in its original or subsequently modified form) required by Metz, does not release all of plaintiffs' rights against Metz. Issue Number 2 is therefore resolved in favor of Metz and Interstate, and against plaintiffs.

Issues 3 and 5:

These two issues are interrelated and generally concern the propriety of the negotiations as to the Receipt's form and content. Specifically, in Issue 3 plaintiffs claim the Receipt was negotiated oppressively, in bad faith, and in breach of the bargaining agreement, while in Issue 5 plaintiffs claim the Union did not fairly represent them during the negotiations of the Receipt.

According to Martin N. Lessman, general counsel, vice president, and secretary for Metz, he initially prepared a document entitled "Release and Receipt" between one and two pages in length. Lessman testified that the Union did not accept the initial draft and it was subsequently revised. Lessman further testified that Metz's reason for having a receipt was to ensure the person employee picking up the check was the right person and have the employees bring up any disputes at the time they received their severance pay. Contrary to plaintiffs allegations, Lessman stated that Metz and the Union agreed on the form of the receipt, that it be treated as a receipt, and that there was no intent to have it affect any other litigation.

Bernard Clausen, president of Local 433 since 1971, testified that the Union rejected the initial Release drafted by Metz and after negotiations agreed to the form of a second release. According to Clausen, the purpose of the release was to allow Metz to make sure the amount paid was proper and that it was received. Although the arbitrator retained jurisdiction to resolve any disputes that arose as to the severance pay award, Clausen indicated that no one asked the Union to take the receipt back to

arbitration. Clausen further testified that the receipts were discussed at monthly meetings and the Union informed its members who were concerned about the receipt's effect that their signature on the receipt would have no effect on their future claims.

Issue 4:

With regard to plaintiffs' request for attorney's fees, the Court notes that no evidence or statement of fees or expenses has been filed as of the date of this Memorandum.

III

CONCLUSIONS OF LAW

Construing plaintiffs' claims against Local 433 as alleging a breach of duty of fair representation, the Court concludes that issues 3 and 5 must be decided against plaintiffs and in favor of defendant Local 433.

A union must fairly represent employees both in the negotiation and administration of the collective bargaining agreement. *Smith v. Hussmann Refrigerator Co.*, 619 F.2d 1229, 1236 (8th Cir.) (en banc), *cert. denied*, 449 U.S. 839 (1980), *citing Humphrey v. Moore*, 375 U.S. 335 (1904). "This duty extends to all stages of the negotiation and administration process and is owed to all employees within the unit represented." *Id.* In negotiating on behalf of its members, "[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its

discretion." *Id., quoting Ford Motor Co. v. Huffman,* 345 U.S. 330, 338 (1953).

For plaintiffs to establish their claim that Local 433 breached its duty of fair representation in the negotiation of the Receipt in question, plaintiffs must show that the Union's handling of this matter was "perfunctory, arbitrary, discriminatory, or in bad faith." *Taylor v. Belger Cartage Service, Inc.,* 762 F.2d 665, 667 (8th Cir.1985), *citing International Brotherhood of Electrical Workers v. Faust,* 442 U.S. 42, 47 (1979); *Vaca v. Sipes,* 386 U.S. 171, 190 (1967); *Brown v. Transworld Airlines, Inc.,* 746 F.2d 1354, 1357 (8th Cir.1984).

In the instant case plaintiffs have not shown that Local 433 acted oppressively, in bad faith, or in breach of the bargaining agreement in negotiating the language of the Receipt. As the Court has already found, the Receipt (before and after the parties agreed to the changes shown in footnote 5) was not drafted with any intent to release any of plaintiffs' claims in other cases. Plaintiffs received assurances that such fears were unfounded and were informed by their president, Clausen, that their signature on the Receipt would not jeopardize or release any claims they might have in companion cases. The Court therefore concludes and finds that plaintiffs' contentions that Local 433 acted oppressively, in bad faith, or in breach of the bargaining agreement are unsupported by the evidence and without merit. The Court therefore finds in favor of defendant Local 433 and against the plaintiffs on these claims in issues 3 and 5.

With regard to plaintiffs claims against defendants Metz and Interstate, the Court likewise concludes that

said claims are not supported by the evidence. The uncontradicted testimony of both Marlin Lessman and Bernard Clausen, who negotiated the Receipt on behalf of Metz and Local 433, respectively, shows that the Receipt drafted by them was not intended to be a release of any claims plaintiffs might have in any companion cases. Assurances were given to this effect and plaintiffs have presented no evidence to show the defendants' intentions were otherwise.

The Court therefore finds in favor of defendants Metz and Interstate and against plaintiffs on their claim contained in issue 3 of the pretrial order. Having resolved these issues, the Court now turns to plaintiffs request for attorney's fees, contained in issue 4.

Attorney's fees are recoverable only by a prevailing or successful litigant, and then only if authorized by statute or if the litigant falls within an exception to the "American Rule." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) ("plaintiff must be a 'prevailing party' to recover attorney's fees under [42 U.S.C.] Section 1988' "); *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247-49 (1975); *Hall v. Cole*, 412 U.S. 1 (1972). *See also Taylor v. Safeway Stores, Inc.*, 524 F.2d 263, 273 (10th Cir.1975) (denying attorney's fees to plaintiff who did not prevail on any class claims in a Title VII action); *Thomas v. J.C. Penney Co.*, 531 F.2d 270 (5th Cir. 1975) (attorney's fees not awarded to unsuccessful litigants); *Sapp v. Renfroe*, 511 F.2d 172, 178 (5th Cir.1972). "[P]laintiffs may be considered 'prevailing parties for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.' " *Hensley v. Eckerhart*, 461 U.S. at 433 *quoting*

*Nadean v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir.1978) (footnote omitted).

The Court cannot find any basis for awarding attorney's fees to plaintiffs. Plaintiffs have not achieved any success in bringing this lawsuit. The Receipt in question never deprived plaintiffs of any future rights or causes of action in companion cases and it has been available for plaintiffs' signature, along with plaintiffs' checks for their severance pay. Because the Court has found for the defendants on all claims, the plaintiffs are clearly not prevailing parties and, therefore, are not entitled to attorney's fees.

Finally, the Court mentioned in footnote 1 that a fourth defendant, the Bakery Confectionery and Tobacco Workers Union, International AFL-CIO (International Union), has not filed an answer and did not appear at the May 16, 1985 hearing. The collective bargaining agreement is between the defendants Metz and Interstate and defendant Local 433. The International Union has no connection with and is not a party to the agreement. In its answer, Local 433 indicated that it was the exclusive bargaining representative of the plaintiffs/employees (filing No. 3). Furthermore, no evidence was offered at the trial to sustain any claims against the International Union. Since Local 433 was the only union designated as plaintiffs' exclusive bargaining agent, no liability can attach to the International Union's conduct. *Sinyard v. Foote & Davis Division of McCall Corp.*, 577 F.2d 943, 947 (5th Cir.1978). Therefore, the Court finds in favor of the defendant International Union and against plaintiffs.

## IV.

## CONCLUSION

In accordance with the above Findings of Fact and Conclusions of Law, the Court finds in favor of the defendants and against the plaintiffs on all claims. A separate order and judgment consistent with the above findings and conclusions will be entered.

Dated this 9 day of September, 1985.

## FOOTNOTES

1. The Court notes that plaintiffs named the Bakery, Confectionery and Tobacco Workers Union, International AFL-CIO as a defendant, however, the international union has not filed an answer, no counsel has entered an appearance on its behalf, and it was not represented at the May 16, 1985 hearing.

2. Neither Metz nor Interstate appealed the arbitrator's December 15, 1983 award and the same is final and binding upon them.

3. Counsel for Metz and Interstate indicated at the May 16, 1985 hearing that $47,000 has been paid out to employees who have signed the release and receipt, while $26,000 remains to be paid to employees upon their signing of the release and receipt. Of the original 36 plaintiffs, 21 have received their severance pay (Defendants' exhibit 6. The Court notes that 2 individuals, Frederick Deal and William J. Marsh, are listed as having been paid but were not named as plaintiffs in the present action), while 15 named plaintiffs still have not collected the amounts they are due. (Defendants' exhibit 7).

4. The "Release and Receipt" form [hereinafter the Receipt] is reproduced below:

RECEIPT

"WHEREAS, Metz has calculated each employees' severance pay according to the Arbitrator's instructions in his decision by following the instructions set forth in Article XXXIV of the Labor Agreement between Interstate and the Union and using the Pension information and calculations supplied by William H. Mercer, Inc., the Actuary for Bakers Local No. 433 Pension Fund; and

WHEREAS, the undersigned employee desires to settle any claims to which the undersigned employee may be entitled as a former employee of Interstate as described in James Doyle's Arbitration decision of December 15, 1983.

NOW THEREFORE, in combination [another Receipt form has "consideration" in lieu of "computation"] of the sum of ___, (the computation of which is attached hereto as Exhibit A and made a part hereof) the undersigned, does by these presents release and discharge Interstate Brands Corporation and Metz Baking Company, and the stockholders, Directors, Officers and employees of each of the foregoing entities, of and from all suits, actions, causes of actions, claims and rights to severance or termination pay in any capacity whatsoever which the undersigned may now or hereafter have and the undersigned further confirms hereby that this receipt shall apply to the undersigned's heirs, personal representatives assigns and beneficiaries as well.

Dated this ___ day of ___, 1984.

THE UNDERSIGNED:

_____

WITNESS:

_____"

5. A photocopy of the revision to which Mr. Cashen and Mr. Rasmussen agreed was attached to the Memorandum Brief of defendants Metz and Interstate, submitted after the May 16, 1985 hearing, and marked at Ex. B. Said revision is reproduced below.

" . . . does by these presence release and discharge, for severance and termination pay purposes only, Interstate Brands Corporation and Metz Baking Company, and the Stockholders, Directors, Officers and employees of each of the foregoing entities of and from ~~all~~ "severance" suits, actions, causes of actions, claims and rights to severance *pay* ~~or termination pay in any capacity whatsoever~~ which the undersigned may now have under the provisions of the award of arbitration of James Doyle issued on December 15, 1983, and the undersigned further confirms hereby that this receipt shall apply to the undersigned heirs, personal representatives, assigns and beneficiaries as well."

Undersigned however, reserves any rights he might have in the pending action in the District Court of Douglas County, Nebraska, captioned *Nebraska Equal Employment Opportunity Commission v. Interstate Brands Corporation and Metz Baking Company*, Doc: 838 No: 715.

"OK JOE P. CASHEN ON BEHALF OF I B C & METZ."

"OK AS TO RESOLVING ISSUE RE ISSUE #1 OF PRE-TRIAL ORDER.

D. O. RASMUSSEN"

---

## AGREEMENT

THIS AGREEMENT, made and entered into by and between METZ BAKING COMPANY, ITT CONTINENTAL BAKING COMPANY, INC., and INTERSTATE BRANDS CORPORATION, hereinafter referred to as the Employer and THE BAKER, CONFECTIONERY AND TOBACCO WORKER'S UNION, LOCAL NO. 433, of Omaha, Nebraska, hereinafter referred to as the Union, or Employees, for the employees within the classifications hereinafter designated who are in the employ of the Employer:

## WITNESSETH:

THAT, in consideration of the covenants hereinafter contained, by and on the part of each of the parties hereto, it is hereby mutually agreed as follows:

## ARTICLE I

## RECOGNITION

SECTION 1. The employer recognizes Bakery, Confectionery and Tobacco Worker's Union, Local 433, of Omaha, Nebraska, as the exclusive bargaining representative of employees who are engaged in the preparation, production, shipping, wrapping and packing of bakery products, also truck loaders and miscellaneous helpers for the purpose of collective bargaining.

SECTION 2. All employees who on the effective date of this Agreement are members of the Union and all employees who become members after that date may

maintain their membership in the Union for the duration of the Collective Agreement.

SECTION 3. It is further understood and agreed that if applicable State and Federal laws which prohibit signing the Union Shop Contracts shall be repealed or amended so as to make Union Shop Agreements valid and legal during the terms this Agreement is in force and effect, the above provision shall be superseded by the provisions of Article I of the Agreement existing between the parties hereto prior to May 1, 1947.

## ARTICLE II

## STEWARDS

The Employer recognizes the right of the Union to designate job stewards to handle such Union business as may from time to time be delegated to the job stewards by the Union Executive Boards. Job stewards shall properly report all complaints to Employer.

## ARTICLE III

## DELEGATES TO CONVENTIONS

Delegates to conventions and elected officers shall be given required time off for Union duties without pay, but notice of such necessary time off shall be given to the Employer as soon as possible.

## ARTICLE IV

## EXCLUSIVE AGREEMENT

The Employer agrees not to enter into any agreement or contract with its employees, individually or collectively, which in any way conflicts with the terms and provisions of this Agreement.

## ARTICLE V

## TEMPORARY TRANSFERS

Section 1. The Union agrees to cooperate with the Company in filling jobs of a temporary nature within or between departments. There shall be no abuse of this provision. In the event a controversy occurs over such transfer, the Union Steward will be consulted by the supervisory personnel.

Section 2. Any regular full time employee working under more than one classification shall receive the rate of wages provided in the highest classification in which he or she has performed one-fourth (1/4) of their guaranteed work week of forty (40) hours, (namely, ten hours work in the higher classification) and there shall be no evasion of this clause by shifting of regular full time employees, provided, however that any person now employed shall not be reduced in the present classification by the application of this rule. Temporary vacancies shall be limited to sixty (60) days. After sixty (60) days, it becomes a permanent vacancy and goes up for bid in the normal manner. Such shall not apply to temporary vacancies due to illness or vacations.

## ARTICLE VI

## ARBITRATION

Section 1. In the event a dispute shall arise between the Employer and the Union with reference to the proper interpretation or application of the provisions of this contract, such dispute shall be reduced to writing within seven (7) calendar days of the date the dispute arises, and if such dispute cannot be settled by mutual agreement of the parties, then upon the request of either the Employer of the Union, or both, such dispute shall be referred to a Board of Arbitration. Said Board of Arbitration shall consist of three (3) members, one of whom shall be appointed by the Employer, one by the Union, and the third member appointed by the two (2) members so selected. In the event the two (2) members first chosen cannot agree upon a third member within three (3) days after the second member has been chosen, then such third member shall be chosen as follows:

Section 2. The Union and Employer party to the dispute shall write a joint letter to the Director of the United States Mediation and Conciliation Service requesting that he submit the names of five (5) persons from this general locality who would be available to act as a third arbitrator, and from such list of five names, the Employer shall strike two (2) and the Union shall strike two (2), and the person whose name is still remaining on said list shall become the third arbitrator and the Chairman of the Board of Arbitration. Such Arbitration Board shall submit its award in writing and such award shall be binding upon the Employer and the Union and upon the employees involved.

Section 3. The party requesting arbitration shall give written notice of the fact to the other party and shall in such notice furnish the name of its arbitrator, and the opposing party shall within five (5) days thereafter appoint its arbitrator and give notice thereof in writing to the other party. The parties shall divide the expense of the third arbitrator.

## ARTICLE VII

## STRIKE AND LOCKOUT

SECTION 1. The Union agrees that it will not, during the time this contract remains in force, call out on strike the employees of the Employer for any reason other than the violation of this contract, and then only after twenty-four (24) hours written notice to the Employer, and failure on the part of the Employer upon such notice to cure such violation within said twenty-four (24) hour period, or to offer in writing to submit the disagreement to arbitration as provided in Article VI herein, and any such strike, if called, shall be only against such Employer or Employers signing this contract agreement who shall have violated this contract.

SECTION 2. The Employer agrees that it will not, during the time this contract remains in force, enforce a lockout against the employees of the Employer for any reason other than the violation of this contract and then only after twenty-four (24) hours written notice to the Union, and failure on the part of the Union upon such notice to cure such violation within said twenty-four (24) hour period or to offer in writing to submit such controversy to arbitration as above stated, and any lockout, if

instituted, shall be instituted only by the Employer or Employers signing this contract agreement whose employees shall have violated this contract.

## ARTICLE VIII

## PRODUCTS FOR STRUCK BAKERY PLANTS

It shall not be considered a violation or breach of this Agreement for the employees working under this contract to refuse to produce products for any bakery plant which is involved in a bona fide labor dispute, strike or lockout.

## ARTICLE IX

## PICKET LINE CLAUSE

It shall not be a violation of this Agreement for the Local Union to require its members to refuse to go through or work behind any legal and authorized primary picket line sanctioned by the Local Union, party to this agreement, and it shall not be cause for disciplinary action for any employee to refuse to go through or work behind any such picket line.

The Union shall give twenty-four (24) hours prior written notice to the Employer of its intention to honor such picket line.

## ARTICLE X

## SENIORITY

Section 1. Except in executive or supervisory positions, if permanent vacancies occur, the regular full time employee with the greatest plant-wide seniority, if qualified, shall be given preference in filling the job.

Section 2. All such vacancies shall be posted on the bulletin board for three (3) working days exclusive of Saturdays and holidays and within seven (7) working days thereafter the job will be filled. The posting shall indicate the shift, wage rate and general job description. Once regular full time employees place their names on the bid sheet they cannot delete their name from the bid. Regular full time employees who are awarded a bid will be allowed a two (2) week training and qualifying period, which may be extended to three (3) weeks by agreement of Company and Union. During the trial period the job vacated will not be posted for bid until such time as the successful bidder has proven that he or she can satisfactorily perform the work of the new job. Afterwards, the vacated job will be posted and awarded as outlined above. This then closes the bidding. If any employee qualifies before the training and qualifying period expires, he or she shall receive the rate on the job which he or she is performing. The Employer shall decide the qualifications of the employee for such new job or vacancy.

Section 3. Upon failure to qualify for a new position after promotion, the employee shall have the privilege of returning to the position of employment held by him or her at the time of promotion, and shall receive the same

pay then received by other employees in the same classification.

Section 4. In the event it becomes necessary to reduce the working force for the lack of business or other legitimate reasons, the last person hired in the plant shall be the first person laid off and in returning to work the last person laid off shall be the first person recalled, for a permanent full time job.

Section 5. Regular full time employees with thirty (30) days or more seniority in the plant may in the case of lay-off apply their plant seniority as follows:

A. Employees may replace employees in order of seniority.

B. The employees who are laid off and exercise their plant seniority shall carry forward their plant seniority.

Section 6. An employee who is recalled and cannot qualify for such full time job or disqualifies him/herself shall forfeit his/her seniority and right to further recall.

Section 7. Failure to report within three (3) days after notice of recall or a lay-off for more than twelve (12) months shall terminate an employee's seniority and right to recall. Notice of recall shall be by registered mail to address furnished Company by laid off employee.

Section 8. Regular full time employees on layoff, if qualified shall be given the opportunity to work any part time hours available. Failure to accept such part time work or failure to qualify for such work shall not affect the employers obligation to recall that employee for a regular full time job as required above. The employer

shall use reasonable efforts to notify such employee of the available part time work. Such reasonable effort would include: attempt to contact employee by telephone and requesting assistance from the Union Stewards. Such part time work shall not be used to accrue seniority.

Section 9. When new jobs are created except in an executive or supervisory position, the oldest employee in point of service in the plant, if qualified, shall be given preference in filling the various job openings, but the Employer shall decide the qualification of the employee for the various jobs created. Upon failure to qualify for a new position, the employee shall have the privilege of returning to the position of employment held by him or her, and shall receive the same pay then received by other employees in the same classification.

Section 10. Employers agree to provide a plant wide seniority list on April 1st of each year.

Section 11. The Employer will give a copy of all bids to the steward.

Section 12. An employee is allowed three (3) successful bids per year except for bidding on a higher paid job.

## ARTICLE XI
## HOURS OF WORK – PREMIUM PAY AND GUARANTEED WORK WEEK

SECTION 1. Forty (40) hours shall constitute the maximum work week before overtime premium pay; forty (40) hours shall constitute the guaranteed minimum work week for all regular full time employees. Eight (8)

hours shall be the maximum work day before overtime premium pay. Seven (7) hours shall be the minimum work day. Overtime shall be paid for work in excess of eight (8) hours per day or forty (40) hours per week. If and when the Employer shall operate a five (5) day drop sales week (5 production days), then the minimum work day shall be eight (8) hours (under the five (5) consecutive day work week, there will be two (2) seven (7) hour minimum work days per work week).

SECTION 2. The clause in this contract which guarantees a given number of work hours per week shall not be construed to mean that the Employer is required to pay wages to employees when the plant is not operating by reasons of bombings, strikes, lay offs, floods, war, riots, act of God, in the event of shutdowns or reduced work week due to energy shortages, or anything over which the Employer has no control. Such energy shortages must be verified by the authority responsible for the curtailment, or the energy supplier curtailing the supply.

SECTION 3. The Employer shall not be required to pay overtime rates for work in excess of eight (8) hours in any day and again pay overtime rates a second time for work in excess of forty (40) hours in the work week. Overtime rates shall be paid at the rate of time and one-half, based on the wage scale for classified workers.

SECTION 4. Regular full time employees' scheduled work week shall consist of five (5) days with a minimum of forty (40) hours of work. The two (2) days off each week need not be consecutive.

SECTION 5. All regular full time employees who work each day during the scheduled work week will be guaranteed forty (40) hours of pay for the work week.

SECTION 6. If a regular full time employee works on his or her scheduled day off, they shall be guaranteed seven (7) hours at time and one-half, eight (8) hours guaranteed if Employer is on a five (5) day drop sales week (5 production days) for the hours so worked on said day, provided they also work on their five (5) scheduled work days during said week. Any employee who works on his or her scheduled day off shall not be required or scheduled to take another day off for that work week.

SECTION 7. Each Thursday, before the end of the first shift, the scheduled days off for the following week shall be posted in the plants. Starting time shall be posted two (2) days in advance. A copy of the schedule shall be made available to the appointed Union Steward. There shall be no split shifts.

SECTION 8. Before a person leaves on their last day of employment in any work week, any regular full time employee shall be able to determine from the supervisory personnel of their department the time when they shall report for work on their first scheduled work day of the following work week, and they shall not be required to report at a different hour, except in cases of emergency caused by other employee's failure to report for work as scheduled.

SECTION 9. No employee shall be required to work in excess of twelve (12) hours, excluding lunch, without their consent, except in case of breakdown or act of God.

SECTION 10. When starting times are changed over four (4) hours, three (3) days per week, employees can vacate the job and use their seniority to bump wherever their seniority will permit. Qualifying period as provided in Article X will apply in these cases. (THIS SECTION TEN (10) APPLIES TO METZ ONLY). An employee will be notified as soon as possible of expected overtime.

SECTION 11. It is understood and agreed to by the parties hereto that the following provisions constitute a modification of affected work week provisions contained in the basic labor agreement. It is recognized by the Employer that a work schedule designed to provide employees with two (2) consecutive days off is a serious objective of the Union and of the employees it represents, and, therefore, the Employer shall take such steps as are practical in its judgment without doing serious harm to its business and thereby the job security of its employees to meet that objective. It is agreed that the basic Labor Agreement between the parties shall be amended effective July 1, 1974 to provide the following:

(a) Any regular full time employee who is assigned to a work schedule that does not provide for two (2) consecutive days off shall be credited with an earned work credit of ten dollars ($10.00) for each Sunday worked under any such non-consecutive day work schedule. Part time employees replacing full time employees on a job for a full scheduled work week that does not provide for two (2) consecutive days off shall receive work week credit. It is understood that it is the intention of this Agreement to, and the Employer shall, maintain or modify existing work schedules so as to provide either

consecutive days off or the earned work credit provided for in this Agreement.

(b) The pay provided for in paragraph 1 above shall be paid in the form of a lump sum after December 1st of each year, or, such pay, once accrued, may be taken in the form of paid time off if the regular full time employee requests such time off and Employer agrees.

(c) An employee must be on the payroll as of December 1st of any calendar year to be eligible for payments accrued under paragraph 1 above and on such date must be a regular full time employee with at least thirty (30) days of service. Employees on lay-off status with right to recall shall likewise be eligible for payments credited. A regular full time employee who continues on the payroll as part time employee shall be entitled to payments accrued. Any employee who resigns and gives adequate notice of such resignation shall be entitled to receive payment for accrued work week credits. Any regular full time employee who is permanently separated as the result of a plant closing shall be entitled to payments accrued. A regular full time employee who has been on the payroll with at least thirty (30) days of service but voluntarily terminates or is discharged prior to December 1, shall receive payment for his/her accrued work week credits.

## ARTICLE XII

## DEFINITIONS

For the purpose of clarity in the interpretation of this contract, the following definitions shall apply to the classifications mentioned herein:

*Superintendent*: One not engaged in the actual production or distribution work of the plant.

*Supervisor*: One supervising production or distribution work in the plan who does not perform actual work at any of the various machines or other work displacing a regular employee, except in cases of emergency.

*Working Foreperson*: A supervisor who also performs actual work at any one of the various machines or any other kind of work. Working foreperson may perform actual work normally performed by any other employee in the bargaining unit in an emergency and under such circumstances as are hereinafter listed and similar circumstances which may arise. Working forepersons may work relief during the lunch period or during relief breaks, may work relief for sickness, or other employees not showing up for work or not available, working forepersons may do designated work which is not of sufficient duration as to require a regular full time employee on a shift providing the persons actually on the shift are occupied with other duties preventing them from performing the designated work. Working forepersons may work a regular shift in a regular department, such as, a working foreperson working part time or all the time on the bench or working foreperson working the shipping department in the manner in which working forepersons

are presently operating in the shipping department of CONTINENTAL BAKING COMPANY and METZ BAKING COMPANY. Working forepersons help where the work is not progressing satisfactorily or there is a lag in production, and working forepersons may teach and train employees in the bargaining unit. In the Make-up Department working forepersons may not take part of a regular full time employee's shift to prevent such employee receiving overtime.

*Dough Mixer*: One responsible for and engaged in the actual mixing of doughs and sponges.

*Pie Mixer*: One responsible for and engaged in the actual mixing of pie doughs and fillings.

*Cake Mixer*: One responsible for and engaged in the actual mixing of cake batters and icing.

*Oven Person*: One responsible for the operation of the oven, for the proofing of bread, who loads or unloads, or fires, or adjusts the same, or one responsible for and who operates roll, cake or pie ovens.

*Bench Person*: Those who are capable, through experience, to complete operation required by hand on the bench of bread, rolls, cakes, or cookies.

*Machine Person*: This includes dividers, moulders, twisters, panners, cake depositors, doughnut machine operators, mechanical slicing machine and wrapping machine unit operations, who are the persons employed on and responsible for the operation and adjustment of those machines.

*Bake Shop Helpers*: One engaged in the production department not otherwise classified.

*Oven Dumper or Oven Helper*: One who dumps bread pans from the oven; also, one who assists in loading the oven.

*Icers, Boxers, and Baggers*: Those employed in icing, finishing and labeling of cakes, pies, or donuts.

*Relief Person*: One who relieves other employees on their day off. Relief employees shall be paid the rate of the highest classification in which they perform any work.

*Break Person*: One who relieves other employees for relief periods and lunch. Break employees shall be paid the rate of the highest classification they relieve for relief periods or lunch.

*Fruit Cooker*: One who cooks fruit and other filing for pies or rolls.

*Stock Person*: One engaged in receiving, checking or storing of raw materials.

*Head Stock Person*: In charge of stock and receiving.

*Ingredient Scaler*: One who is responsible for pre-mixing and pre-weighing the ingredients for either cakes, cookies, buns, or bread.

*Packers*: One required to rack, assemble, load trucks, and pack from conveyors, machines, and racks in shipping departments.

*Miscellaneous Helper*: (Other than Bake Shop Helpers). One who does general cleaning around the plant, such as sweeping, scrubbing, exterior machine cleaning, and similar work.

*Pan Cleaner*: One who washes, cleans or prepares for use cake or pastry pans; also one who washes bread pans. Pan cleaners shall not be considered helpers nor as classified workers. When a pan cleaner does work other than that above mentioned, he shall be considered a Helper, and shall receive a Helper's wages.

*Checker*: One responsible for the checking of orders; and also the checking of returns.

*Cooler Person*: One who loads the cooler.

*Dough Room Helper*: One who assists the dough mixer.

*Regular Full Time Employee*: One who is employed not less than four (4) days in any one week.

*Part Time Employee*: One who does not work on a regular schedule but who is subject to call. Part time employees' wage scale shall be the same as regular employees receive for the same work. Part time employees shall be given preference for full time employment when vacancies occur provided they are qualified, and provided they give notice to the Employer that they are available for regular employment Four (4) hours shall be the minimum work day for part time employees. The guaranteed work week shall not apply to such employees. It is agreed that a regular employee will not be sent home and relieved by a part time employee before the regular employee has had eight (8) hours work on that day.

The Employer may schedule regular part time shifts. The status of a part time employee who is scheduled and does work a regular work week shall not be effected

where such situation is caused by absenteeism, illness, vacations and/or institution of a part time shift.

In the event an employee feels he/she is working excessive overtime hours and makes that feeling within a reasonable length of time, part time employees may be used to relieve the situation.

*Cake Decorator:* A person who is qualified through experience and training, and who performs the operation of decorating fancy cakes.

*Automatic Pan Washing Machine Operator:* One who operates and is responsible for adjustment and supervision of the operation of an automatic pan washing machine.

*Pie Dough Sheeter Operator:* One who operates and is responsible for the adjustment and operation of the Pie Dough Sheeter.

*Power Lift Operator:* An employee who operates a power lift.

*Broth Person:* Scale ingredients, make lard formulation, set broths at the right temperature and transfer broths.

*Panel Person:* One responsible for the operation for the panel, scaling weights, dough temperature, putting racks in proof box and checking pan feeder line.

*Pan Packer on Bread Moulder and Panel:* One who racks pans from bread moulder or panel.

## ARTICLE XIII
## WAGE RATES

SECTION 1. The Employer agrees to pay the employees not less than the following scale of wages:

| | Effect-tive May 2, 1982 Per Hour | Effect-tive May 7 1983 Per Hour | Effec-tive May 6, 1984 Per Hour |
|---|---|---|---|
| Working Foreperson | $9.00 | $9.50 | $10.10 |
| Cake Decorator | 8.93 | 9.43 | 10.03 |
| Donut Mixer, Dough Mixer, Brothperson, Panel person | 8.83 | 9.33 | 9.93 |
| Oven Person | 8.83 | 9.33 | 9.93 |
| Cake Mixers | 8.83 | 9.33 | 9.93 |
| Pie Mixers | 8.83 | 9.33 | 9.93 |
| Bench Persons | 8.76 | 9.26 | 9.86 |
| Machine Person | 8.74 | 9.24 | 9.84 |
| Ingredient Scalers | 8.73 | 9.23 | 9.83 |
| Oven Dumpers and Helpers: (Discharge end tunnel oven) | 8.79 | 9.29 | 9.89 |
| Oven Dumpers and Helpers | 8.75 | 9.25 | 9.85 |
| Dough Room Helpers | 8.65 | 9.15 | 9.75 |
| Head Stockperson | 8.75 | 9.25 | 9.85 |
| Checkers | 8.65 | 9.15 | 9.75 |
| Fruit Cookers | 8.65 | 9.15 | 9.75 |
| Pie Dough Sheeter Operator | 8.58 | 9.08 | 9.68 |
| Pan Racker on Bread Moulder and Panel | 8.63 | 9.13 | 9.73 |
| Stockperson | 8.53 | 9.03 | 9.63 |

| | | | |
|---|---|---|---|
| Automatic Pan Washing Machine Operator | 8.53 | 9.03 | 9.63 |
| Cooler Person, Bake Shop Helpers, Packers | 8.53 | 9.03 | 9.63 |
| Pan Cleaners | 8.43 | 8.93 | 9.53 |
| Miscellaneous Helpers: (Other than bake shop helpers) | 8.42 | 8.92 | 9.52 |
| Packers – Donuts and Pies | 8.43 | 8.93 | 9.53 |
| Power Lift Operator | 8.63 | 9.13 | 9.73 |
| Flour Blenders | 8.63 | 9.13 | 9.73 |
| Pie Flipper, Icers, Boxers and Baggers | 8.34 | 8.84 | 9.44 |

Economic items shall be retroactive to the effective dates designated for employees in the employ of the employer upon ratification of the contract.

SECTION 2. An additional ten cents ($.10) per hour over the regular wage scale shall be paid to all employees for work performed between the hours of 6:00 P.M. and 6:00 A.M..

SECTION 3. The Employer agrees that it will not reduce any wages now being received by employees which are higher or better than those herein set forth.

Section 4. Effective May 18, 1980, employees shall receive during the first nine (9) months of service with the Employer not less than 80% of the wage rate provided for in this Agreement. After nine (9) months of service with the Employer, such employees shall be paid not less than 90% of the wage rate provided for in this Agreement. After twelve months, commencing on the first anniversary date of employment and thereafter, such employees shall receive the wage rates provided for in

this Agreement. This shall apply to all classifications provided for in this Agreement. Employees in the employ of the Employer on May 17, 1980, (ratification date) shall not be affected and their rates shall be red circled to provide pay in accord with the current contract rates.

## ARTICLE XIV
## LUNCH AND RELIEF PERIODS

Section 1. Company agrees all employees shall receive a ten (10) minute relief period in that period of time ninety (90) minutes after employee starts his/her shift and prior to the completion of one hundred fifty (150) minutes of the shift.

Section 2. Another relief period of ten (10) minutes shall be provided all employees in that period of time ninety (90) minutes after employee returns from lunch and prior to the completion of one hundred fifty (150) minutes. On shifts over eight (8) hours, relief shall be provided on a comparable basis. Relief periods may be given by working forepersons or some employee in the bargaining unit, designated for that purpose by the Employer. there shall be no reduction in employee's pay for relief periods.

Section 3. A lunch period of thirty (30) minutes without pay shall be scheduled in that period of time, one hundred ninety five (195) minutes after the starting time and be completed by three hundred fifteen (315) minutes. This provides a period of one hundred twenty (120) minutes, in which to start and complete lunch period. Any employee not receiving a full thirty (30) minutes within

the prescribed time, lunch time will be given and paid for by the employer.

## ARTICLE XV
## HOLIDAYS

Section 1. The following holidays, or at the Employer's option the day immediately preceding, shall be observed as holidays: Memorial Day, Independence Day, Labor Day, Thanksgiving, Christmas, and New Years Day. In weeks in which holidays occur, regular full time employees covered by this contract shall be paid for eight (8) hours at their regular basic rate for hours not worked on the day so observed as a holiday, subject to the following conditions and exceptions:

Section 2. No employee is to be paid for the holiday unless they work on the last scheduled working day before the holiday and on the holiday itself, if scheduled, or their first scheduled working day after the day the bakery is not working because of a holiday, except in the event of an excused illness or absence. However, a full time regular employee (one who has been in the Company's employment over thirty (30) days) may, if he/she has been absent on either or both of the two (2) days mentioned above bring to the Employer a doctor's certificate showing that he/she was too ill to work. The fact that an employee is on vacation during a week in which a holiday occurs shall not deprive an employee of holiday pay if they would otherwise qualify for such holiday pay under the provisions of this contract.

Section 3. If the total absence from work, during which the absence on the day before or after the holiday

is included, exceeds two (2) calendar weeks, employee is presumed to be on "sick leave" and is not to receive holiday pay, regardless of reason for such absence. During such two (2) week period the employee shall not qualify for more than one (1) paid holiday.

Section 4. Employees scheduled to work four (4) days in a holiday week will be guaranteed thirty-two (32) hours of work and employees scheduled to work five (5) days in a holiday week will be guaranteed forty (40) hours of work, provided the employees so scheduled to work report for work and work such required hours on their scheduled days. The guarantee herein provided for shall not include but shall be in addition to the eight (8) hours holiday pay which the employee may be entitled to under the provisions of this Article. Any employee who is called in to work on a holiday week on their scheduled day off shall receive time and one-half for the hours worked on such day.

Section 5. In addition to the holidays set forth above, each regular full time employee shall receive his/her birthday as a holiday with eight (8) hours pay at straight time. If the employee's birthday falls on a day on which he/she is not scheduled to work, it shall be observed on the first day following on which he/she would be scheduled to work. If the birthday falls on a day employee is off another mutually agreeable day will be observed. If birthday falls on February 29th, March 1st will be observed. An employee must have six (6) months seniority to be eligible for the birthday holiday provisions contained herein.

Section 6. Overtime at the rate of time and one-half the regular rate of pay shall be paid after thirty-two (32) hours of actual time worked during weeks in which the above holidays occur. There shall be no more than one (1) premium pay for the same hours worked.

## ARTICLE XVI
## VACATIONS

SECTION 1. All regular full time employees who have been in the service of the Employer for one (1) year or more shall be granted an annual week's vacation with pay, and all regular full time employees who have been in the service of the Employer for three (3) or more consecutive years shall be granted an annual vacation of two (2) consecutive weeks with pay, all regular full time employees who have been in the service of the Employer for ten (10) or more consecutive years shall be granted an annual vacation of three (3) consecutive weeks with pay, and all regular full time employees who have been in the service of the Employer for eighteen (18) or more consecutive years shall be granted an annual vacation of four (4) weeks with pay, all regular full time employees who have been in the service of the Employer for twenty-five (25) or more consecutive years shall be granted an annual vacation of five (5) weeks with pay.

Section 2. Vacation compensation shall be computed on the basis of forty (40) hours at the individual's rate of pay in effect at the time of such vacation.

SECTION 3. Employees who are laid off during their first year of employment for a period of less than six (6) months shall receive one (1) week's vacation after they

have worked for the Employer twelve (12) full months. (A month in which the employee has worked 145 hours or more shall constitute a full month). Seniority for these employees shall date as far as lay-offs and recalls are concerned from the date of their employment.

SECTION 4. Vacation periods shall be earned on the anniversary date of the employment of the employee, except in case of employees laid off during the first year of employment whose vacation anniversary date shall be the date their first vacation is earned, but vacations shall be spread out over the entire twelve (12) months of each contract year and shall be chosen by employees in order of seniority, except that no less than six (6) employees shall be absent from the bakery on vacation at any one time. However, the Employer will endeavor to permit more than six (6) employees to be absent from the bakery at any one time if it does not impair the efficiency of production.

Section 5. Those weeks where less than six (6) employees request vacation this clause will not apply.

Section 6. Pay in full for vacation week, or weeks, and work done prior to vacation must be made before employee leaves on vacation.

Section 7. An employee who is absent from work for a period of excess of four (4) months shall receive pro-rate pay of full vacation benefits. An employee who is absent from work because of illness less than four (4) months shall receive his or her full vacation pay.

Section 8. Employees with more than one (1) week's vacation due may, if he or she desires, split the vacation

into not more than two (2) periods, but such employee may exercise his or her seniority for only one (1) period until all others have chosen. Second selection shall be based on seniority after all employees have exercised their initial selection.

SECTION 9. Employees whose employment is terminated, except in cases of dishonesty, drunkenness, drinking on the job, or insubordination, shall receive vacation pay pro-rated, after the first full year of employment, on the basis of 1/12th or forty (40) hours for those who have worked one (1) or more years but less than three (3) years, and 1/12th of eighty (80) hours for those who have worked three (3) years or more but less than ten (10) years; and 1/12th of one hundred twenty (120) hours for those who have worked ten (10) years or more than 1/12th of one hundred sixty (160) hours for those who have worked eighteen (18) years or more, for each completed month worked subsequent to the anniversary date of employment.

SECTION 10. Any employee who enters the armed services under the provisions of Article XXX of this Agreement, or is laid off for less than six (6) months after having worked for twelve (12) months or more, shall receive such portion of their vacation pay as has been earned by them from their last anniversary date up to the time they leave the employ of the Employer.

Section 11. If and when such employee returns from the armed services, or from his lay-off to the services of the Employer, he/she shall receive on reaching his/her original anniversary dates such portion of his/her vacation pay as has been earned by the person from the time

of their return to the time of their anniversary date. Such employees shall be permitted to take their vacation as earned under the provisions of Section 1 of this Article, but without pay other than herein provided.

SECTION 12. Any employee now in the service who has not been paid prorated vacation pay as provided in the first paragraph of Section 4 hereof shall if they return from the armed services to the services of the Employer, receive their regular full vacation with pay upon reaching their original anniversary date of employment after such return.

## ARTICLE XVII

## PAY PERIOD

Employees shall receive full pay weekly for all time spent in the service of the Employer. Wages shall be paid each and every week, payday to be determined by the Employer.

## ARTICLE XVIII

## MANAGEMENT, DISCHARGE AND DISCRIMINATION

SECTION 1. The management of the business and the direction of the working force are reserved to the Employer, it being recognized that the duration, tenure and termination of individual employment is a constituent part of management.

SECTION 2. Employees having more than thirty (30) days' continuous service shall be discharged only for just cause, and no such employee shall be discharged or

temporarily laid off without being given one calendar week's previous notice or pay for one week. In all cases of discharge, employees shall be given written notice stating the cause of discharge and a copy of such notice shall be given to the Union. However, in cases of discharge for dishonesty, drunkenness or insubordination the written notice of discharge need not be given one week in advance, and one week's advance pay will not be required.

Section 3. Appeal from discharge must be taken within one week from the date of discharge by written notice to the Employer setting forth the ground of appeal. If such appeal is not taken within such period, then objection to discharge shall be considered completely waived.

Section 4. The hearing on appeal from discharge shall be had within one week from the time the Employer receives notice of appeal. If the Employer fails to grant hearing within such time, or if hearing be had and the matter can not be satisfactorily adjusted by mutual agreement, then upon the request of either party it shall be submitted to arbitration as provided in Article VI hereof.

Section 5. No employee shall quit their position without giving the Employer one week's notice under penalty of paying to the Employer damages in the amount equal to the one week's pay.

Section 6. There shall be no discrimination on account of Union activities.

## ARTICLE XIX

## REST PERIOD BETWEEN WORKING DAYS

An unbroken rest period of not less than ten (10) hours must be allowed every member of the Union during each twenty-four (24) hours of working days, except in case of emergency.

## ARTICLE XX

## RECORDING OF STARTING AND QUITTING TIME

The Employers agree to keep in their place of business a satisfactory means of recording the starting and quitting time of employees, the records of which shall be accessible to a business representative of the Union whenever a complaint is made to the Union.

## ARTICLE XXI

## CHECK-OFF

The Employer shall deduct Union dues and initiation fees from employee's pay check, when proper authorization in writing is furnished in conformity with State and Federal Laws. Union dues shall be deducted not later than the last pay period of the current month, for the month following. Initiation fees shall be deducted each week until such fees are paid in full.

## ARTICLE XXII

## EXPENSE OF PHYSICAL EXAMINATION

Employers requiring employees to take physical examinations must pay the expense of such examinations.

## ARTICLE XXIII

## PRESENTABLE WORKING CLOTHES AND EMPLOYER'S CONTRIBUTION TOWARD EXPENSE

Section 1. Employees must keep themselves clean and report for work in presentable working clothes. It is understood that presentable working clothes shall be clothes appropriate for the work being performed in food production plants, and for Production Classifications shall be clean, white clothes.

Section 2. When aprons are required by the Employer, the Employer shall furnish the aprons and launder the same. Aprons shall remain the property of the Employer and the employee shall be responsible for them.

Section 3. Regular full time employees (employees who have been in the Company's employment more than thirty (30) days) shall be allowed one dollar ($1.00) per week each week they are working and on the payroll, including their vacation weeks, toward the cost of procuring, maintaining and laundering presentable working clothes.

## ARTICLE XXIV
## HELPERS

Section 1. Bake Shop Helpers are to be allowed as follows: One Helper for one to five journeypersons working in Bread Shop; two helpers for six to ten journeypersons working in Bread Shop; and three helpers for eleven to fifteen journeypersons working in such Bread Shop, and so on in like proportion. This applies to each shift. The ratio of helpers to classified workers in Cake and Pastry Shops shall be double the number of helpers permitted in Bread Shops.

Section 2. For the purpose of this Article, the terms "journeyperson" or "classified workers" shall be those employees who are being paid at an hourly wage rate equal to or greater than that set forth herein for the classification of Ingredient Scaler.

## ARTICLE XXV
## UNION BUSINESS AGENT

A business agent of the Union, upon presentation of proper credentials, shall have the privilege of entering the shop during working hours after securing a permit from the representative of the Employer in charge of the plant.

## ARTICLE XXVI
## LAY OFF BECAUSE OF SICKNESS OR INJURY

Employees who have to lay off on account of sickness or injury for a period of not to exceed two (2) years shall

not lose their jobs or seniority rights by reason of such absence. This time can be extended by mutual agreement of the Employer and the Union.

## ARTICLE XXVII

## MATERNITY LEAVE

The Employers will conform to appropriate practices approved by Federal legislation. The employee, on such maternity leave, shall return to work after termination of such maternity leave, within a reasonable time in accord with Federal requirements.

## ARTICLE XXVIII

## FUNERAL LEAVE

In the event of death in the employee's immediate family, (i.e., father, mother, sister, brother, son, daughter, step child, husband, or wife, mother-in-law and father-in-law, it is recognized by the parties that the employee may need time off to attend the funeral service, from the day of the death to the day of the funeral. If any of these days off are the employee's scheduled working days, the Employer will grant eight (8) hours pay at the straight time hourly rate for each such full day lost, but not to exceed a maximum of three (3) full days.

## ARTICLE XXIX

## DEDUCTIONS FROM PAYCHECK

The Employer shall not be allowed to deduct anything, except deductions required by law, from any paycheck without the written consent of the employee.

## ARTICLE XXX

## MILITARY SERVICE

Any regular full time employee on the active seniority list of the Employer who is inducted into military service under the provisions of the Federal Selective Training Act of 1940, or any amendment to said Act, hereinafter enacted, or voluntarily enlisted into the military service of these United States in time of war or drafted by the Federal Government into employment in a defense industry, will be considered upon leave of absence and will accumulate seniority during such service, and upon termination of such service, will be employed in their former classification and at the current rate for such work; provided, they have not been dishonorably discharged from such service with the United States Government and are physically able to do work available; and further provided, they report for work within ninety (90) days of the date they are discharged from such service with the United States Government, and provided the Employer's circumstances have not so changed as to make it impossible to provide their reemployment.

## ARTICLE XXXI

## NOTICE OF INABILITY TO REPORT TO WORK

Employees who are unable to report to work due to sickness or other unavoidable cause shall report the fact to the Employer at least six (6) hours prior to their scheduled starting time, otherwise as soon as possible prior to that employees starting time. Employees giving notice shall contact a designated member of management. The Company and Union agree to mutually resolve violations and abuses under this Article.

## ARTICLE XXXII

## BAKERS LOCAL 433 HEALTH AND WELFARE FUND

Section 1. (a) Continuing from the second day of May, 1982, the Employer agrees to make payments to the Bakers Union Local No. 433 Health and Welfare Fund for each employee working in job classifications covered by the said collective bargaining agreement, as follows:

For each hour or portion thereof, for which an employee subject to the collective bargaining agreement receives pay, the Employer shall make a contribution of seventy-nine cents ($.79) to the above named Welfare Fund up to a maximum of forty (40) hours in any week.

The company agrees to maintain the current level of benefits during the term of this agreement when and if the reserve level of the Bakers Local No. 433 Health and Welfare Fund reaches One Hundred Thousand Dollars ($100,000.00) or less.

Effective July 4, 1982, the Employer agrees to make an additional contribution of three cents ($.03) per hour up to a maximum of forty hours in any week for the purpose of increasing the life insurance from Three Thousand Dollars ($3,000.00) to Ten Thousand Dollars ($10,000.00).

Two cents ($.02) per hour of the per hour contribution to the Welfare fund is to pay 100% of the health insurance premium for pensioners under the BCW No. 433 Health and Welfare plan. Such payment of premium will continue to pensioners age 65 or effective date for commencement of Medicare, whichever is sooner. Such applies to future pensioners also.

In the event the local Union decides to secure Health and Welfare coverage from another source, it shall give the Employer thirty (30) days written notice.

For the purposes of this ARTICLE, it is understood that contributions shall be payable on behalf of employees from the first day of employment, whether said employees are permanent, temporary, seasonal or full time or part-time employees, and regardless of whether or not they are members of the Union. It is further understood that each hour paid for, including hours of paid vacation, paid holidays, and other hours for which pay is received by the employee in accordance with the collective bargaining agreement, shall be counted as hours for which contributions are payable.

However, no contributions will be made for those hours taken as time off under the work week credit provisions contained herein when such hours are taken

off in lieu of the accrued credits earned under the work week credit provisions.

(b) The Employer hereby agrees to become a party to the Agreement and Declaration of Trust dated June 8, 1972, establishing the fund, or any duly constituted successor trust fund for this purpose, and agrees to be bound by all the terms and provision of said agreement, a copy of which is annexed to this collective bargaining agreement and made a part hereof. The Employer further agrees irrevocably to designate as its representative on the Board of Trustees of the Fund such trustees as are named in said Agreement and Declaration of Trust as Employer Trustees together with their successors selected in the manner provided in the said Agreement, and agrees to be bound by all the action taken by the said Employer Trustees pursuant to the said Agreement and Declaration of Trust.

(c) The contributions made to the fund shall be used by it to provide welfare benefits effective on the above date for eligible employees and their eligible dependents, if any, in accordance with the applicable plan of such fund.

(d) It is agreed that all contributions shall be made at such times and in such manner as the Trustees require; and the Trustees shall have the authority to have an independent Certified Public Accountant audit the payroll and wage records of the Employer for the purpose of determining the accuracy of contribution to the Welfare Fund.

(e) If the Employer fails to make contributions to the Welfare Fund within thirty (30) days after the date

required by the Trustees, the Local Union, in addition to any rights the trustees may have, shall have the right to take whatever steps are necessary to secure compliance with this ARTICLE, any provisions of the collective bargaining agreement, including the no-strike clause, to the contrary notwithstanding. It is expressly understood that the Employer's liability for payment hereunder shall not be subject to the grievance or arbitration procedure of the collective bargaining agreement and that the no-strike clause, if any, shall not prohibit any action the Union chooses to take to compel payment of contributions. The Employer shall be liable for all costs incurred in collecting the payments due hereunder, together with attorney's fees and such penalties as may be assessed by the Trustee.

Section 2. The parties agree and represent that there is no other agreement between them regarding welfare benefits other than this ARTICLE, presently in effect. The parties further agree that no agreement regarding welfare benefits other than this ARTICLE shall be effective during the period covered by the said collective bargaining agreement, except with the consent of the Board of Trustees, other than the local Union designating that the contributions be made to a different fund.

Section 3. The expiration date of the present collective bargaining agreement between the local Union and the Employer is May 5, 1985. Copies of any renewal or extension agreements will be promptly furnished to the welfare fund office and, if not consistent with this standard collective bargaining clause, can be used by the Trustees as the basis for termination of participation of the Employer.

Section 4. This ARTICLE shall be binding upon the parties hereto, their successors, administrators, executors and assigns. In the event that the Employer sells, leases, or transfers this Company or any part thereof, or is taken over by assignment, receivership or bankruptcy proceedings, the successor shall be bound by the terms and conditions of this ARTICLE for the life hereof. The Employer shall give notice of the existence of this ARTICLE to any purchaser, transferee, lessee, assignee or other successor in interest. Such notice shall be in writing, with a copy to the Trustees, not later than ten (10) days prior to the effective date of the transaction. The Employer agrees that its failure to so notify its successor and the Trustees will operate to continue its obligations under this ARTICLE.

Section 5. If at any time during the term of this Agreement or any renewal or amendment thereof, there shall be enacted any federal or state laws or regulations requiring the Employer to secure, provide or pay for insurance or welfare benefits or coverage of the type being provided by the fund to employees covered hereunder it is understood that the aforesaid plan of benefits provided by the fund may have to be varied in compliance with such new law. If such law does not permit the fund to assume and discharge the Employer's obligation, the Employer may, upon thirty (30) days written notice to the Union, reopen this Agreement solely for the limited purpose of reviewing the amount of Employer contributions to the fund.

Section 6. All of the foregoing is subject in all respects to the provisions of the Labor-Management Relations Act of 1947, and to any other applicable laws.

Section 7. Benefits under the Baker's Union Local No. 433 Health and Welfare Fund are presently being extended to regular full time salaried employees of the Bakery and Confectionery Worker's International Union of America, Local Union No. 433. The Agreement and Declaration of Trust establishing the Baker's Local Union No. 433 Welfare Fund allows for contributions by such Employer on behalf of such regular full time salaried employees provided said Employer agrees to make such contributions.

## ARTICLE XXXIII

## PENSION

The Employer agrees to continue to pay to the Baker's Local No. 433 Pension Fund on behalf of each employee covered by this agreement a sum equal to seventy-eight and one-half cents ($.785) per hour for each hour for which said employee receives pay, up to a maximum of forty (40) hours in any week. Effective May 1, 1983, the Employer's contribution will be increased thirteen and one-half cents ($.135) per hour to a total of ninety-two cents ($.92) per hour to increase the pension benefit from Seventeen Dollars ($17.00) per year of accrual service credit to Twenty Dollars ($20.00) per year accrual service credit. Effective May 6, 1984, the Employer's contribution may be increased ten cents ($.10) per hour in the event such amount is necessary according to the actuary to maintain benefits. However, no contributions will be made for those hours taken as time off under the work week credit provisions contained herein

when such hours are taken off in lieu of the accrued credits earned under the work week credit provisions.

The payments shall be used by the Bakers Local No. 433 Pension Fund to provide retirement benefits for eligible employees in accordance with the plan of said Baker's Local No. 433 Pension Fund as determined by the Trustees of said Baker's Local No. 433 Pension Fund to be applied to the eligible employees based on the amount of Employer contribution.

The Employer hereby agrees to become a party to the Agreement and Declaration of Trust establishing the said Bakers Local No. 433 Pension Fund and agrees to be bound by all terms and provisions of the Agreement, a copy of which is annexed to this Agreement and made a part hereof. The Employer further agrees irrevocably to designate as its representatives on the Board of Trustees of the fund such Trustees as are name in said Agreement and Declaration of Trust as Employer Trustees together with their successors selected in the manner provided in the said Agreement, and agrees to be bound by all the action taken by said Employer Trustees pursuant to the said Agreement and Declaration of Trust.

It is understood and agreed that the pension plan referred to herein shall be such as will qualify for approval by the Internal Revenue Service of the United States Treasury Department, so as to allow the Employer an income tax deduction for the contributions paid hereunder.

Employer agrees to process its portion of the retiring employees' pension applications without delay.

## ARTICLE XXXIV

## SEVERANCE PAY

SECTION 1. It is agreed that each regular full time employee who is displaced from his or her employment by reason of the closing of an entire plant, or the introduction of labor saving equipment, shall be compensated for such displacement providing they have been actively employed by the Employer for a period of at least three (3) years. An eligible employee's compensation for their displacement shall be on the basis of thirty (30) hours of severance pay (at their straight time hourly rate of pay) for each full year of actual employment, commencing with the fourth (4th) year thereof. Payment under this formula shall be limited to a maximum of nine hundred (900) hours severance pay.

SECTION 2. The above described Severance Pay will not be paid to:

(a) Any employee who is offered employment with the Company in another plant of the Employer which is located within a reasonable distance from the employee's place of employment.

(b) Any employee who accepts a job with the Company at any location.

(c) Any employee who voluntarily quits or is discharged for just cause before he is separated from employment by the Company.

(d) Any employee, who at the time of separation, is eligible for a Normal Pension, as provided for under the provisions of the Bakery and Confectionery Union Local #433 Industry Pension Fund.

(e) If any employee subject to Severance Pay is eligible to receive an early retirement or disability pension benefit under the Bakery and Confectionery Workers Union Local #433 Industry Pension Fund, whether or not he or she elects to accept such early retirement or disability benefits, he or she shall receive as severance pay that percentage of severance pay as set forth above which the excess of the Normal Pension Benefit under such Pension Plan over the amount of early retirement or disability benefit, to which he or she is then entitled bears to the Normal Pension. For example, if the Normal Pension Benefit is $100.00 and an employee is entitled to an early retirement or disability benefit of fifty-eight dollars ($58.00), then his or her severance pay will be reduced by fifty-eight percent (58%).

(f) Any employee accepting Severance Pay shall forfeit and cease to have any seniority and recall rights as provided for in this Agreement.

(g) Any employee re-employed after receiving Severance Pay shall be considered a new employee from the date of re-employment.

(h) In the event an eligible employee wishes to remain on the plant seniority list, for the purpose of possible recall, he or she may elect to defer acceptance of his Severance Pay for a period of twelve (12) months. At any time during such period, however, he or she may request their Severance Pay and their right of recall and seniority shall terminate as of that date.

(i) If such employee has not been recalled by the end of such period, he or she shall be paid Severance Pay and their right of recall and seniority shall terminate as of that date.

## ARTICLE XXXV

## ANTI-DISCRIMINATION

The Employer and the union agree not to discriminate against any individual with respect to compensation, terms or conditions of employment because of such individual's race, color, religion, sex, age or national origin. Nor will they limit, segregate or classify employees in any way to deprive any individual employment opportunity because of race, color, religion, sex, age or national origin.

## ARTICLE XXXVI

## SUCCESSORS AND ASSIGNS

This Agreement and the provisions herein contained shall be binding upon the parties hereto, their heirs, successors or assigns.

## ARTICLE XXXVII

## LIMITATIONS

THIS AGREEMENT shall be in full force and effect from May 2, 1982, until May 5, 1985, both dates inclusive. Thereafter, said Agreement shall continue in force and effect unless sixty (60) days notice in writing is given by either party prior to May 5, 1985, until a new Agreement (the terms of which shall become retroactive to the above expiration date) has been consummated and signed, or this Agreement after the above expiration date has, upon written notice, been canceled or terminated by the Employer or by the Union with the sanction of the Bakery

and Confectionery Workers International Union of America.

IN WITNESS WHEREOF, the parties hereto have hereunto subscribed their names on the ___ day of ___, 1983.

METZ BAKING COMPANY

BY: /s/ Illegible
Employer

ITT-CONTINENTAL BAKING COMPANY, INC.

BY: /s/ Illegible
Employer

INTERSTATE BRANDS CORPORATION

BY: /s/ Illegible
Employer

BAKERY AND CONFECTIONERY WORKERS UNION LOCAL #433

BY: /s/ Illegible
Union

/s/ Dave Bell I.B.C.
/s/ Annie C. Moore
/s/ Karl J. Bonowski Jr.
/s/ Illegible